APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York, and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

~~Frederick Bass~~, WILLIE RICHARDSON, FOSTER DASH and and McKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Filed May 24, 1969
Certiorari Granted October 13, 1969

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Wilbert Ross—Docket Entries.

(United States District Court, Eastern District of New York, Docket No. 67 C 500)

5/25/67	Petition filed for a Writ of Habeas Corpus.
5/25/67	By Bruchhausen, J. Memorandum and Order filed. The Court concludes that the relator's motion lacks merit and that the petition should be dismissed. The papers will be filed without payment of fees. (See Memorandum and Order).
5/25/67	A copy of the memorandum and order was on this day mailed to the Warden at Dannemora, for delivery to the relator, by the Secretary to Judge Bruchhausen.
8/23/67	Letter of Clerk of Court, U.S.C.A., filed re papers, etc.
8/24/67	Record mailed to Clerk, U.S.C.A., S.D.N.Y., per letter dated 8/18/67.
9/ 1/67	Acknowledgment of Clerk of Court, U.S.C.A. (Post card) re receipt of papers sent them, etc.
2/27/68	Copy of Order, U.S.C.A., filed granting motion for a certificate of probable cause to the Relator herein.
2/27/68	Letter of U.S.C.A., filed re certification of the original papers which had been sent them, etc.

Petition for Writ of Habeas Corpus.

STATE OF NEW YORK }
COUNTY OF CLINTON } ss.:

WILBERT ROSS, being duly sworn, deposes and says:

1. That the same is his true name, that he is over the age of twenty-one years and of sound mind, a citizen of the United States by birth, and the party identified above as the relator-petitioner (hereinafter relator).

2. That he is presently confined at a place known to him as Clinton Prison, in the Village of Dannemora, County of Clinton, established under the laws of the State of New York.

3. That the person who so confines him is one Daniel McMann, upon information and belief Warden of Clinton Prison (hereinafter respondent), upon the authority of a certain commitment, upon information and belief numbered Clinton Prison No. 32974, which, upon information and belief, rests upon a certain Judgment entered in the Supreme Court of the State of New York, County of Kings (sub nom. County Court, Kings), upon the 14th day of March, 1955, ordering the confinement of relator for a term of 45 years to life upon his conviction by plea of the felony of second degree murder, on the 4th day of February, 1955.

4. That the commitment aforesaid is void and invalid, in that the Judgment upon which it rests is infirm, owing to the fact that relator's plea of guilty was induced by threats as detailed in his Supplementary Affidavit; and furtherly because the existence of a certain written inculpatory statement (hereinafter *confession*), which was given

after the uttering of threats by police officials, served to aggravate the force of the threats which induced the plea, in violation of relator's due process rights under the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

5. That relator is not detained by virtue of a Mandate, Process or Final Order which reserves to any Judge or Court of the United States the exclusive power to order his relase.

6. That his petition is not made in contravention of traditional tests of Federal-State comity.

7. That no previous application has been made for a Writ of Habeas Corpus in any Court of the Judiciary System of the United States.

WHEREFORE, relator prays that the Writ issue and a hearing be held, and upon the facts and the law the Writ be sustained; and that this Court do all else that to it may seem both Meet and Just.

Respectfully submitted,

/s/ WILBERT ROSS,
Relator-Petitioner,
P. O. Box B No. 32974,
Dannemora, New York 12929.

(Sworn to by Wilbert Ross, May 18, 1967.)

Supplementary Affidavit of Wilbert Ross.

STATE OF NEW YORK, }
COUNTY OF CLINTON, } ss.:

WILBERT ROSS, Being duly sworn, deposes and says that as relator in the Cause before this Honorable Court, he makes this Supplementary Affidavit in amplification of the allegations set forth in the Petition for Writ of Habeas Corpus (4), as follows:

1. Sometime during the month of May, 1954, I was confined in the Raymond Street Jail at 125 Ashland Place in the Borough of Brooklyn, County of Kings, upon a charge of Attempted Grand Larceny; and on a day of that month, I was taken from my cell and delivered into the custody of two persons held out to me to be detectives, who told me that the District Attorney wished to see me. I recall having signed a paper of some kind at the Jail which, to my best recollection, was some kind of printed form.

2. The detectives drove me to the Court House located at Smith and Schermerhorn Streets. It is possible that some conversation took place in the auto, but it would have been of a trite nature; no indication was given as to the purpose for which the District Attorney wished to see me. At the Court House I was led to an office and told to sit and wait; the time, as closely as I can recall, was about 8:30 a.m. or 9:00 a.m. There was a man in the room—not one of the two detectives—but his conversation, if any at all, did not touch upon the purpose of my being there.

3. After about a half-hour a fourth man entered, identified himself as "McCabe, Chief of Detectives," and asked if I was Wilbert Ross; I told him I was, whereupon he placed a collection of papers of some kind on the desk and said something to the effect of "It looks like you've gotten yourself in a little trouble," and I answered something like, "Yes, I guess I have." He then said that if I would help him, he would help me. I asked him what he meant and he told me that he meant I should tell him all about the murder I had committed a month and a half before. This was the first time that any indication was given to me that I was suspected of the commission of a murder. I answered that I knew nothing about any murder, whereupon he declared that he had proof that I had committed the murder, that he had my accomplice in this murder in custody, and that this accomplice had confessed to his own part in the murder which, according to the accomplice, had been compelled by my having forced him at gunpoint to accompany me and take part in the murder under threat of death to his wife.

4. McCabe allowed that he knew well enough that this business about my having forced the accomplice at gunpoint was a lie; unless I told him, however, what had actually happened, he would see to it that I went to the electric chair for murder and kidnapping. I insisted to McCabe that I knew nothing about any murder.

5. In the course of my conversation with McCabe, a number of additional detectives came into the office intermittently, both singly and in pairs. Their entrance had been so unobtrusive that I was astonished to discover that at one time there were fourteen in all. They did not directly speak to me, or even to one another audibly; they just sat there, or stood around, walked, stared at me,

looked at one another and exchanged nods, without addressing any questions to me. One, however, removed his coat and turned his back to me with his service revolver sticking out of his back pocket. I remember that I was constantly distracted by his proximity, but he never spoke a word to me.

6. Thereupon, McCabe told me that he would let me hear and be convinced from the lips of this accomplice. I was taken from the room by three of the detectives and observed another person being led in by other detectives. In an office to which they took me there was an inter-office communication device connected with the office where I had been earlier with McCabe and the detectives. After about ten minutes the device was switched on to enable me to hear what was being said in the room. The voice was that of Robert Jenkins, and just as McCabe had said he would, he was accusing me to the police of having forced him at gunpoint to participate in the murder, and of having threatened his life and that of his wife. His account agreed in every important respect with what McCabe had told me in advance that Jenkins would testify at my trial.

7. After some minutes I was brought back to the office where McCabe was. Jenkins was no longer there. McCabe asked me if I had heard everything, and I told him I had but that it was not true. He laughed and said something on the order of, "Hell, I know it isn't and you know it isn't, and he knows it isn't; but will a jury know it isn't?" And he went on: "They're going to believe him, and deep down inside you know they willl, and because they will, they'll convict you, Wilbert, and you'll go to the chair. So if you think you have the truth on your side, then you have money you can't ever spend. Now you think about that, Wilbert, and you think hard and fast. Because

you've got to decide now. You're facing the electric chair, Wilbert, and I'm the only person who can help you. You know that, don't you?" These are not his exact words, of course, but they are substantially the words he spoke. I did not answer his question, and he half-rose and leaned across the desk and shouted, "Well, dammit, don't you?" and I sort of shrugged. He came around to the front of the desk and said something like, "Wilbert, I don't have time to waste with you". He looked at his watch and said he had to see the District Attorney in an hour, and that if I didn't give him my story to tell the District Attorney, he would have to give him Jenkins' story and he would be finished with the matter. For himself, he did not really want me to go to the electric chair, but he had not gotten to be Chief of Detectives by going to bat for people who refused to give him any cooperation. He had to have a statement from me or it would be just what Jenkins said and while he was not a lawyer, he guessed that was more than enough for the District Attorney.

8. I told McCabe I did not know what to do, that I had a lawyer from my case, Jerome Karp, Esquire, and that I would want to talk to him first. McCabe said that was completely out of the question, there was no time for me to get advice from lawyers and ministers and brothers and sisters. He told me it was my life and if I was any kind of man I would recognize that only I could save it and they couldn't do it for me. He said I was in man-sized trouble and had to make a man's decision. "Are you going to be a man and help yourself, or are you going to lose the last opportunity you'll ever have to stay alive simply because you're not grown-up enough to think and act for yourself?" he asked me. I then gave a statement to the police which was reduced to writing, and which I signed.

9. I was then taken to the home of acquaintances where the detectives conducted a search for a gun. Failing to find it, they took me back to the office, brought me something to eat and gave me some books to read. They then took me back to the Raymond Street Jail. I cannot say with absolute certainty whether the officers who took me back were the same as those who had taken me from the Jail; I remember one of the detectives said I had nothing to worry about because McCabe could be trusted to keep his word; I recall no other conversation.

10. Two days later I was again taken from Raymond Street Jail by detectives. I do not at this date recall if they were the same detectives, or if the same procedure was followed in my removal; I do not recall having signed any paper. They told me they had not yet found the gun and that McCabe was very upset over that, that it would be too bad if I were to antagonize him at this stage because he had really done his best for me with the District Attorney and the latter had agreed to go along with McCabe in the matter if I continued to cooperate. I then told them where to find the gun and they went and got it.

11. After finding the gun, the detectives took me on the same day to an assistant district attorney. I would guess that he probably told me his name when he told me he was an assistant district attorney, but I do not remember his name, if I ever knew it. He told me that I had helped myself by cooperating with McCabe but that the final decision in the case would be made by him and he expected the same cooperation I had given to McCabe. He questioned me about the murder and had the questions and answers stenographically recorded by a man present at the time. The questions and replies were transcribed and typewritten for my signature. I signed it. I was not advised

that I could consult with an attorney or remain silent; I did not, as earlier, express a wish to consult with an attorney. I was taken back to Raymond Street Jail. In September, 1954 I was sentenced to a term of two to three years in state prison on the pending charge of attempted grand larceny and was taken to Sing Sing Prison.

12. In October, 1954 I was removed from Sing Sing Prison and taken back to Raymond Street Jail, then arraigned in County Court, Kings County, to an indictment charging first degree murder. About one month later I was visited at the Jail by a man who identified himself as Harvey Strelzin and told me that he had been assigned by the Court to be my attorney. To my best recollection he did not then question me about the charge but asked me to tell him everything I could remember about the changes I had undergone in my life—childhood, school, home life, military service, anything that came to mind. We must have spoken for nearly an hour.

13. Sometime later he visited me again; I would say it was five or six weeks afterward, but I cannot be certain with greater specificity. I asked him then "to get my confession back". I recall those to have been my exact words. I meant that I wanted to repudiate the confession and have it suppressed. I spoke in the belief that it could be done in some way. He told me that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make "a jury of twelve cousins" convict me and send me to the electric chair. He told me that he would "get the first possible break" for me from the District Attorney, but that I "would be dead by the Fourth of July" if I risked a trial.

14. When I was brought to Court in February of 1955, Mr. Strelzin came in to see me while I was in the detention cell. I asked him again about repudiating and suppressing my confession; this seemed to exasperate him because he spoke sharply about having gone all through that before and that I had better listen to him because *he* was my lawyer and not those convicts in Raymond Street who would all be in Sing Sing in six months with all the law they knew. I told him I had not asked him on the basis of anything anyone had told me. He seemed to grow calmer at that. He told me he had spoken to the District Attorney, who was willing to allow me to plead to second degree murder, and I would get twenty years to life; he said it was an "or else" offer, that I knew the evidence the District Attorney could present against me. He said that things were no better than before and, if anything, were much worse; the District Attorney had the confession, the gun, and Jenkins, who could be expected to tell any story to help himself. If I insisted on going to trial, well, he was my lawyer and would do what he could, though that couldn't amount to very much because "there isn't a pair in the world to beat four aces." Twenty to life was a long time, he wasn't going to argue that it wasn't; but it had to be better than the electric chair.

15. I went out into the Courtroom and pleaded guilty to second degree murder.

16. Such events as took place and are not recorded here are omitted in the belief that they are not relevant; and the failure to have included a detail is not intended to deny its existence or occurrence except where it might conflict in any material aspect with any event narrated here, in which case the omission is intended to deny such existence or occurrence.

17. The foregoing represents a true, accurate, and substantially complete account of the events treated, within the memory of the deponent.

Respectfully submitted,

/s/ Wilbert Ross,
WILBERT Ross, Deponent,
Box B, No. 32974,
Dannemora, N. Y. 12929.

(Sworn to by Wilbert Ross on May 18, 1967.)

Memorandum of Law.

A.

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II. *History*

Relator moved the Supreme Court of the State of New York, County of Kings, for a writ of error *coram nobis* in a petition verified 23 March 1965, to vacate a Judgment entered in that Court (sub nom. County Court, Kings County) on 14 March 1955 pursuant to a conviction by plea of guilty under Indictment No. 1459/1954 of the felonly of second degree murder, whereby he was sentenced to a term of 45 years to life imprisonment, which motion and petition were denied without a hearing by Order made on 21 May 1965 (BARSHAY, J.). Subsequent motion for reargument dated 10 June 1965 was granted and the original decision adhered to by Order made on 15 September 1965 (BARSHAY, J.). The Order was appealed in the Second Judicial Department of the Appellate Division of the Supreme Court of the State of New York, which Court unanimously affirmed the Order below on 5 July 1966. An application for leave to appeal in the New York Court of Appeals pursuant to C. Cr. Pro. § 520 was denied (FULD, Ch. J., 1-10-67). No appeal was taken directly from the Judgment. No application was made in the United States Supreme Court for *certiorari*. Relator has never before sought *habeas corpus* in a Court of the Judiciary System of the United States.

• • •

WHEREFORE, For all the reasons herein argued, the Writ should issue.

Respectfully submitted,

/s/ WILBERT ROSS,
Relator-Petitioner,
No. 32974,
P. O. Box B,
Dannemora, New York 12929.

(Sworn to by Wilbert Ross on May 18, 1967.)

Memorandum and Order.

The relator, now in State custody, seeks a writ of habeas corpus.

Pertinent Allegations in the Petition

In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

In October, 1954, he was arraigned on an indictment, charging him with the commission of first degree murder;

Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the confession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life;

March 23, 1965 (ten years later) he verified a petition for coram nobis, seeking the vacating of the judgment of conviction;

May 21, 1965, the petition was denied without a hearing;

May 24, 1965, the order thereon was entered;

June 10, 1965, reargument of the motion was granted;

Sept. 15, 1965, the original decision was adhered to;

July 5, 1966, The Appellate Division of the Supreme Court, Second Department, affirmed the said order.

Jan. 10, 1967, leave to appeal to the State Court of Appeals was denied;

No appeal was taken directly from the judgment of conviction.

THE GROUND URGED IN SUPPORT OF THE PRESENT PETITION

That the relator's plea of guilty was involuntary and induced by threats.

A PLEA OF GUILTY CONSTITUTES A WAIVER OF ALL NON-JURISDICTIONAL DEFECTS IN ANY PRIOR STAGE OF PROCEEDINGS AGAINST A DEFENDANT, INCLUDING DEFECTS IN A PRELIMINARY HEARING

In United States ex rel. Gleen v. McMann, 349 F. 2d 1018, 1019, the court stated:

> "Appellant claims that his plea of guilty was unconstitutionally coerced by the existence of a confession that had been wrung from him involuntarily. • • •
>
> "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him. • • •
>
> "Petitioner's motions are denied. The respondent's cross-motion to dismiss the appeal is granted."

Petitioner Glenn's application to the Supreme Court of the United States for a writ of certiorari was denied. See United States ex rel. Glenn v. McMann, 383 U. S. 915.

People v. Nicholson, 11 N. Y. 2d 1067, decided July 6, 1962, cited and relied upon by the relator fails to support his position. The court therein, at page 1068, said:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by coram nobis or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert this alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

The Nicholson case, *supra,* was cited with approval in People v. Dash, 16 N. Y. 2d 493, decided April 22, 1965.

The Court concludes that the relator's motion lacks merit and that the petition should be dismissed. The papers will be filed without payment of fees.

A copy hereof is being mailed to the respondent for delivery to the relator.

WALTER BRUCHHAUSEN,
United States District Judge.

Application for a Certificate of Probable Cause.

WILBERT Ross, duly sworn deposes and says: That he is the appellant in the above entitled cause and does make this application for a certificate of probable cause. The following action has been taken thus for:

A judgment of conviction was entered against appellant in the Supreme Court of Kings County on the 14th day of March, 1955, ordering the confinement of the relator for a term of 45 years to life upon his conviction by plea of the felony of second degree murder, on the 4th day of February 1955.

On March 23, 1965 a petition for coram nobis, seeking to vacate the judgment of conviction; on May 21, 1965 the petition was denied without a hearing; on June 14, 1965 reargument of the motion was granted; on September 15, 1965 the original decision was adhered to; on July 5, 1966 the Appellate Division of the Supreme Court, Second Department, affirmed the said order.

January 10, 1967, leave to appeal to the State Court of Appeals was denied;

No appeal was taken directly from the judgment of conviction.

On May 18, 1967, a petition for writ of habeas corpus was sent to the United States District Court, Eastern District of New York; on May 25, 1967, the petition was denied;

(WALTER BRUCHHAUSEN, U.S.D.J.)

On June 16, 1967, an application for a certificate of probable cause was sent to Judge Bruchhausen;

On June 19, 1967, the application was denied.

Appellant requests that this court review the erroneous ruling of the District Court in that his rights under the

Application for a Certificate of Probable Cause.

Fifth and Fourteenth amendments of the constitution of the United States were violated as follows:

1. Appellant's plea of guilty entered under the force of threats was involuntary and must be set aside as violating due process.

Appellant's plea of guilty, upon which his conviction rests was not made voluntary, but rather was induced by threats made to him during his interrogation.

Where a plea of guilty has been entered as the result of coercion by the court or officers of the court, the judgment of conviction based on that plea must be vacated. *People ex rel. Lyons* v. *Goldstein,* 290 N. Y. 10 (1943); *People* v. *Richetti,* 302 N. Y. 290. This coercion can consist of threats or promises made to a defendant. *People* v. *Picciotti,* 4 N. Y. 2d 340 (1958); *People* v. *Emmons,* 17 A. D. 2d 1029 (4th Dept. 1962).

2. Appellant was denied the representation of counsel.

During the interrogation by the police and before the appellant made a confession, he asked to be represented by counsel, but this request was denied.

The State of New York, having formerly instituted criminal proceedings against the defendant in a court having jurisdictoin of the crime charged, even though the defendant has not been arraigned on the complaint, it was precluded from questioning him thereafter either through the police or the district attorney in the absence of his counsel, and any admission obtained from him under such circumstances are constitutionally inadmissible. (*People* v.. *Gregory,* N.Y.L.J. March 19, 1964, p. 17, col. 7) (Shapiro, J.).

Application for a Certificate of Probable Cause.

D.C.N.C. 1963.

Where the accused was indicted for capital crime, he was constitutionally entitled to counsel at every stage of proceeding, terminating in his guilty plea to noncapital Felony—*Anderson* v. *State of North Carolina,* 221 F. Supp. 930.

Leave to proceed in forma pauperis was denied by the District Court and petition for same accompanies this application.

WHEREFORE, appellant prays that this application be granted and the certificate of probable cause issue and an appeal to this court be allowed.

Respectfully submitted,

WILBERT ROSS,
Appellant-Petitioner.

WILBERT ROSS,
Post Office Box B,
Dannemora, N. Y. 12929.

United States Court of Appeals Order of Reversal.

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and sixty-nine.

Present: Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Hon. ROBERT P. ANDERSON,
Hon. WILFRED FEINBERG,
Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this Court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk.

Docket Entries.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA, ex rel. FOSTER DASH,
Relator,

v.

HAROLD W. FOLLETTE, as Warden of Green Haven Prison, Stormville, New York,
Respondent.

Date	*Proceedings*
Oct. 14-65	Filed petition for writ of habeas corpus & order granting the filing thereof without prepayment of fees, etc., application for writ Ret. 10-25-65, Rm. 318—Cannella, J.
Oct. 25-65	Before Cannella, J.—petition submitted—decision reserved
Feb. 3-66	Filed respondent's notice of appearance
Feb. 3-66	Filed petitioner's reply affdvt. with proof of service
Feb. 3-66	Filed affdvt. of Mortimer Sattler in opposition
Feb. 3-66	Filed Opinion #32,035—Petitioner's application for a writ of habeas corpus is denied. So ordered—Cannella, J.—mailed notice
Mar. 16-66	Filed petitioner's notice of motion for a certificate of probable cause
Mar. 16-66	Filed petitioner's letter dated 2-25-66
Mar. 16-66	Filed memo endorsed on motion—Leave to appeal in forma pauperis and a certificate of probable cause are granted. The Legal Aid Society is assigned as counsel—Cannella, J.—mailed notice
Mar. 16-66	Filed petitioner's notice of appeal in forma pauperis—mailed copy to Atty. Gen'l State of NY

Petition for Writ of Habeas Corpus.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

The petition of FOSTER DASH, confined at Green Haven Prison, Stormville, New York, herein respectfully shows:

That the said Foster Dash (hereinafter to be known as relator); the person on whose behalf this writ is applied for is now imprisoned and restrained of his liberty.

That the said relator is now confined at Green Haven Prison, located at Stormville, New York, in the County of Dutchess, and the officer or person by whom he is so imprisoned is, Howard W. Follette, Warden of said Green Haven Prison.

That this relator has not been committed and is not detained by virtue of any judgment, decree, final order or mandate issued by a court or judge of the United States, in a case where such court or judge has exclusive jurisdiction under the laws of the United States; nor have acquired exclusive jurisdiction by the commencement of legal proceeding in such court, or by virtue of a final judgment or decree of a competent tribunal made in a special proceeding, entitled for any cause, except to punish him for contempt; or by virtue of any exclusive or process issued upon judgment, decree or final order.

That the cause or pretense of such imprisonment and restraint according to the best knowledge and belief of your relator, is a certain commitment warrant, order or process issued by the Honorable Judge Lyman, of the then County Court of Bronx County (see indictment No. 215/1959).

That relator brings this petition before this Honorable Court under the Civil Rights Act, 42 U.S.C.A. Section 1981; Title 28 U.S.C. 1443; the Judiciary Act of February 5, 1867, c. 28, Section I, 14 Stat. 385-386; Title 28 U.S.C. Section 2241(a), and 3; Title 28 U.S.C. 2243 and Title 28 U.S.C. 2254.

THE INDICTMENT

That on February 24, 1959, the Grand Jury of Bronx County handed down an indictment with the number 215/1959, entitled "People of the State of New York v. Joseph E. Fields, John Doe, Richard Roe, Peter Loe, charging them with acting together and in concert in committing the crime of Robbery, First Degree.

That on February 25, 1959, the relator, Foster Dash, was arrested and subsequently the above-number indictment was amended to substitute the name "Foster Dash" for the above-cited fictitious name "John Doe".

On April 6, 1959, relator pleaded guilty to the crime of robbery in the second degree and the judgment of conviction was entered on August 3, 1959, with a sentence thereby being imposed of not less than eight (8) years and for no more than twelve (12) years as a second felony offender.

STATEMENT OF PRIOR PROCEEDINGS

That on February 26, 1963, an order was entered denying this relator motion for a writ of error coram nobis (submitted on January 25, 1963), without opinion (Greenberg, J.).

On or about the 29 day of September, 1964, the Appellate Division for the First Judicial Department of the New York State Supreme Court, affirmed the lower court decision.

Leave to Appeal to the New York Court of Appeals was granted, pursuant to Section 520 of the Code of Criminal Procedure, and thereafter on or about the 26 day of April 1965, the action of the lower courts was affirmed (with two (2) justices thereof dissenting). (N.Y.L.J., Mon. April 26, 1965, p. 16, col. 1.)

Federal Statutes Involved

United States Constitution:

Sixth Amendment.

United States Constitution:

Fourteenth Amendment.

"No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor allow any person within its jurisdiction the equal protection of law".

Statement

On or about the 26th day of February, 1959, relator was arrested in New York City by police officers without there being probable cause. When relator inquired of the officers the cause of his arrest he was handcuffed, assaulted by the arresting officers and forcibly taken to the police station.

At the police station, relator was taken to a room, and was handcuffed to a chair. After the elapse of several minutes, a group of other police officers entered the room, and began to beat and question relator about various crimes allegedly committed in New York County. Relator denied having knowledge of any crime, and thereupon, requested counsel to protect him in his constitutional rights.

Relator request for the assistant of counsel was denied, and he was thereupon taken to a police station in the County of the Bronx, where he was again beaten and questioned in incessant relays in an effort to have him inculpate himself for crimes that allegedly had taken place in the Bronx County area. The relator reiterated that he was in-

nocent of any crime, that he be allowed to contact his family, so that he would then have counsel, to protect his constitutional rights. This request was again denied. The relator asked to be confronted with the witnesses against him (if there was any such witnesses), but this too was to no avail. The police officers persistently tried to extort a confession from this relator, by utilizing methods known as the "third degree". He was held incommunicado for 7½ hours; he was then taken to the office of the District Attorney of Bronx County.

Despite the fact that relator was denied his request for the aid of counsel, at no time did he make any voluntary statements to the police or the District Attorney. At the District Attorney's office, relator was interrogated at length about various crimes that allegedly had taken place throughout New York City. Relator made a direct request to the Assistant District Attorney for the aid of counsel and was *flatly denied.* He was informed that he *had already been indicted,* and that he could have counsel soon enough; and if he did not cooperate with them, the Assistant District Attorney would then fix it so that every crime that was then unsolved would be "yours" (relator), and that the same office would "clear the books" with him, for he was a second felony offender. Relator then involuntarily signed a prefabricated confession to a crime that he did not *commit.*

On March 16, 1959, relator appeared for pleading upon the robbery indictment, whereat the District Attorney stated that he was only offering a plea to robbery in the first degree, and that such plea would be sufficient for this relator. Defense counsel advised relator that he had better interpose a plea of guilty to the indictment due to the confession signed by this relator. He further advised relator that there was nothing that he could do for him, and that the best that could be done was for the relator to throw

himself on the mercy of the court. To this relator reminded counsel of the highly improper methods had in the District Attorney's office, and that he wanted to go to trial, for he was not guilty of any crime. However, counsel reiterated, that there was nothing he could do for this relator. The matter was then postponed until April 1, 1959.

On April 1, 1959, relator appeared once again for pleading upon the said indictment, wherefore, the trial Judge stated that if the relator decided to go to trial, and then did not prevail therein, the Court would then impose the maximum penalty upon him; the Court further characterized the crime relator was charged with, as being next to murder and that he would give this relator further time to think it over. The proceedings were then postponed until April 6, 1959.

Due to the undue pressure which was placed upon this relator, as well as the alleged co-defendant, on April 6, 1959, relator involuntarily entered a plea of guilty to the crime of robbery in the second degree. Prior to the said plea, the Court coerced relator into stating that he had participated in the said crime, while the alleged co-defendant was compelled to do like-wise.

Rudolph Waterman, Albert Devine, the others that was indicted under fictitious names on the same indictment with this relator went to trial and had their convictions reversed by the Court of Appeals of the State of New York. See *People* v. *Waterman*, 9 N. Y. 561 (1961).

Argument

Relator alleged in his coram nobis petition that on February 24, 1959, a "John Doe" indictment charging him with robbery in the first degree was returned against him; on February 25, 1959 he was arrested, beaten; and that he

requested the assistant of counsel which was denied and he was again beaten. On February 26, after an extensive beating and a prolonged interrogation relator signed a statement in "absence of counsel", confessing to a crime that he was not guilty of. Relator wasn't assigned counsel until February 27, 1959. On March 16, he was advised by this Court appointed counsel that he did not "stand a chance due to the alleged confession signed" by this relator, and on the basis of this coupled with the threat from the trial court that if relator went to trial and was found guilty the maximum sentence would be imposed on him (relator was then a second felony offender thereby facing some 60 years or the rest of his life in prison), relator pleaded guilty. Nevertheless, the courts of the State of New York summarily denied his coram nobis motion without affording relator a hearing and the opportunity of establishing the vital relationship between the alleged confession and the denial of counsel, and the relationship of the threat of the trial court along with the denial of counsel and the alleged confession that was signed by relator, but of a crime that relator was not guilty of, despite the fact that such a claim, if true, is unequivocally a violation of relator rights as guaranteed by the Sixth and the Fourteenth Amendments to the Constitution of the United States.

POINT I

RELATOR WAS ENTITLED TO THE ASSISTANT OF COUNSEL IMMEDIATELY AFTER THE INDICTMENT WAS RETURNED AGAINST HIM AND WHEN HE WAS ARRESTED ILLEGALLY:

This relator was arrested after an indictment was returned against him by the Bronx County Grand Jury, although the arresting officers acted without warrant nor with probable cause. The relator was then beaten in two

police station houses and then taken to the District Attorney office of Bronx County. He requested counsel at every opportunity that was afforded him. In spite of this request or requests, to the police officers and the District Attorney of Bronx County, he was denied. The probabilities are that if relator had been given the assistant of counsel when he was entitled to it, he would not have signed the alleged confession to a crime that he was not guilty of, nor would the court assigned counsel advised him to enter a plea of guilty to the crime that he was not guilty of, had the counsel not known of the fact that relator was to be confronted with this alleged confession at the time of the trial.

Relator's allegations, which are supported by the record, therefore, indicate that he was deprived of his right to counsel at a crucial stage of the proceedings against him. All his problems stem from the deprivation of his right to counsel. *Gideon* v. *Wainwright,* 372 U. S. 335 (1962). Nor can there be any doubts that if the allegations are true relator was deprived of counsel at a critical stage of the proceedings against him. *Escobedo* v. *Illinois,* 378 U. S. 478, *Massiah* v. *United States,* 377 U. S. 201 (1964).

In the instant case, a "John Doe" indictment had already been returned against relator. Relator had the right to counsel immediately upon his arrest. Moreover, under *Escobedo,* supra, this relator was entitled to counsel simply because when:

> ". . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the

police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistant of Counsel' in violation of the Sixth Amendment to the constitution . . ."

Relator's was not only denied the "Assistant of Counsel" by the police officers. He made this request directly to the District Attorney of Bronx County, but of course, this request was also denied by this high prosecuting officer. For the Supreme Court of the United States also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . ." *Haynes* v. *Washington,* 373 U. S. 503, 519.

For after this relator has signed the alleged confession in the office of the District Attorney of Bronx County, after his request for counsel had been denied, there was then no need to deny him the right of counsel. For "One can imagine a cynical prosecutor saying: Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial". *Ex parte Sullivan,* 107 F. Supp. 514, 517-518.

The futility of relator's position is more clearly seen when this Court considers the fact, that the only choice remaining to him—beside the entry of the plea of guilty to a crime that he had not committed—was to proceed to trial in the hope of challenging the admissibility of the alleged coerced confession. For it was only in the case of *Jackson* v. *Denno* (32 U.S.L.W. 4620 (1964), decided by the United States Supreme Court June 22, 1964), that the Court recognized the insoluble plight of a defendant in New York, faced with the decision whether to challenge the admissibility of a confession, had in violation of the United States Constitution. Relator had no such remedy when he was faced with this situation.

Relator's is entitled to the hearing that he have never had in the New York State Court, under the authorities of *Townsend* v. *Sain,* 372 U. S. 293, 310 and *Fay* v. *Noia,* 372 U. S. 391.

POINT II

WHERE THE COURT INDUCED THE RELATOR TO BARGIN AWAY HIS LIBERTY THROUGH COERCION THAT THE COURT PRACTICED ON THE RELATOR:

This relator submitted a motion for a writ of error coram nobis which stated among other things that the trial judge (Lyman, J.) threatened him with a maximum sentence, if relator proceeded to trial and was found guity. A maximum sentence that could have been imposed on this relator was a term of 60 years.

Here we are faced with the fact, that this statement of the trial court was not made on the open record. But it was made directly to this relator and for this relator consideration.

A Judge has always been held to the highest standards of morality and conduct because of the nature of his profession as well as the fact that he is the highest officer of the setting court.

This is not the first case that has come to this District Court, concerning this type situation. For relator have only to call to this Court attention the case of *United States* v. *Tateo,* 214 F. Supp. 560. There as here, the trial court informed the defendant that if he continued trial that a sentence would be imposed on him that would enable the Government to keep the defendant behind bars for the rest of his life. The defendant, Tateo, then entered a plea of guilty.

In a later proceeding under 28 U.S.C. 2255, another district judge (Judge Weinfeld) granted Tateo motion to set

aside the judgment of conviction and for a new trial, determining that the cumulative impact of the trial testimony, the trial judge's expressed views on punishment, and the strong advice given by his counsel rendered it doubtful that Tateo possessed the freedom of will necessary for a voluntary plea of guilty.

There can be no doubt that, if the allegations contained in this relator's motion and affidavit are true, he is entitled to have his plea and sentence vacated. A guilty plea, if induced by promises or *threats* which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to a collateral attack. See *Walker* v. *Johnson,* 312 U. S. 275; Waley v. Johnson, 316 U. S. 101. Out of just consideration for a person accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. *Kercheval* v. *United States,* 274 U. S. 220, 223.

The threats made by the court was not a matter of open record. But how often will a court go on record, when he makes a threat to a helpless defendant? But the people of the state of New York has denied this relator a hearing on this issue. Relator's is now entitled to a hearing on the allegations in this Federal District Court. *Machibroda* v. *United States,* 368 U. S. 478.

Conclusion

Wherefore, upon the authorities cited herein, accordance with the provisions of the United States Constitution, relator prays that this writ of habeas corpus issue, directed to the Hon. Howard W. Follette, Warden of Green Haven Prison, Stormville, New York, or whosoever has the custody of the relator Foster Dash, commanding him to produce the body of Foster Dash at the United States Courthouse,

District Court, for the Southern District of New Yor
Foley Square, New York City, on the 18 day of Octobe
1965, in the forenoon of that day or as soon thereafter a
this relator can be heard for an order to adjudicate th
questions presented herein and to determine whether thi
relator shall be release from custody or for an order re
leasing relator from custody pursuant to the powers of thi
Honorable Court on this writ of habeas corpus and enterin
final judgment thereon.

Respectfully submitted,

Foster Dash #9731
FOSTER DASH #9731
DRAWER B
STORMVILLE, NEW YOR

(Sworn to by Foster Dash on October 4, 1965.)

Affidavit of Mortimer Sattler in Opposition.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MORTIMER SATTLER, being duly sworn, deposes and says:

I am an Assistant Attorney General in the Office of Louis J. Lefkowitz, Attorney General of the State of New York, counsel for the respondent herein, and make this affidavit in opposition to relator's application for a writ of habeas corpus.

Relator was indicted along with three others on February 9, 1959, charged with robbery in the first degree, grand larceny, and assault.

He, together with one co-defendant, pleaded guilty on April 6, 1959 to the crime of robbery in the second degree and on August 3, 1959 was sentenced as a second felony offender to a term of 8 to 12 years. On January 29, 1963 and on February 26, 1963 two separate coram nobis applications were denied by Mr. Justice Schweitzer and Mr. Justice Greenberg. The grounds raised in those proceedings are similar to those raised herein. The orders were affirmed by the Appellate Division, First Department, 21 A. D. 2d 978, and affirmed by the New York Court of Appeals, 16 N. Y. 2d 493. A copy of the brief of the District Attorney of Bronx County is annexed hereto.

Relator raises two contentions—first, that his plea of guilty was a product of a coerced confession and second, that his plea of guilty was coerced by the trial court by telling him that he would get the maximum penalty if he were found guilty after trial.

As to the first contention, it has been firmly established that a voluntary plea of guilty entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant. *U. S.* v. *Doyle*, 348 F. 2d 715 (2d Cir. 1965); *U. S. ex rel. Boucher*

v. *Reincke,* 341 F. 2d 977, 980-981 (2d Cir. 1965); *U. S. ex rel. Glenn* v. *McMann,* —— F2d —— (2d Cir., dec'd August 26, 1965); *People* v. *Nicholson,* 11 N. Y. 2d 1067.

As to the second ground, it appears that at the time that the defendant pled guilty he specifically declared that his plea was being made voluntarily and that no promises were made to him. It further appears from the opinion of the Court of Appeals (16 N. Y. 2d 494), that the prosecutor who appeared in the state court proceedings had filed an affidavit in which he stated categorically that the trial judge had never threatened the defendant, from which that court concluded that this relator had not presented a triable issue on the question of coercion.

Significant also is the fact that two of his co-defendants went to trial, were convicted, subsequently had those convictions reversed (*People* v. *Waterman,* 9 N. Y. 2d 561), and, I am informed, subsequently pleaded guilty to assault and were sentenced to 2½ to 3 years.

Assuming that the Court did inform the defendant as to the possibilities of sentence "such advice is not only not improper but may even be desirable" (PALMIERI, J.). *U. S. ex rel. Meikle* v. *Fay,* 65 Civ. 751, dec'd August 24, 1965; see also *U. S. ex rel. Robinson* v. *Fay,* 348 F. 2d 705.

In the *Meikle* case, *supra,* Judge Palmieri noted that the transcript relating to the entry of the defendant's plea of guilty "demonstrates that defendant made an intelligent and uncoerced choice".

Accordingly, it is respectfully submitted that the application herein should be denied.

(Sworn to by Mortimer Sattler on October 19, 1965.)

Reply Affidavit of Foster Dash.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

FOSTER DASH, being duly sworn, deposes and says:

I am the relator in the above entitled proceedings and that I make this affidavit in reply to the Attorney General's affidavit in opposition to my application for a writ of habeas corpus.

In the instant application for a writ of habeas corpus, relator raised two contentions with (1) that his plea of guilty was a product of a coerced confession and (2) that his plea of guilty was coerced by the trial Court by informing him that he would be sentenced to a maximum term of imprisonment if he (relator) was found guilty.

It is of course as the Attorney General's Affidavit in opposition states (page 2), that a voluntary plea of guilty entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant. *U. S.* v. *Doyle,* 348 F. 2d 715 (2d Cir. 1965); *U. S. ex rel Boucher* v. *Reincke,* 341 F 2d 977, 980-981 (2d Cir. 1965); *People* v. *Nicholson,* 11 N. Y. 2d 1067.

It appears that the United States Circuit Court of Appeals has held:

> "The issue of the defendant's guilt or innocence is not involved in an application for leave to withdraw a plea of guilty. Kerrcheval v. United States, 224 of 274 U. S. at p. 583, of 47 S. Ct. 7 L. Ed. 1009. Upon such an application a trial court is not required to try the issue of guilt or innocence. The issue for determination is whether the plea of guilty was voluntarily, advisedly, intentionally and understandingly entered, or whether it was, at the time of its entry, attributable to force, fraud, fear, ignorance, inadvertence or mis-

take such as would justify the Court in concluding that it ought not be permitted to stand. *United States* v. *Shaner*, p. 600 of 194 F. 2d; *Rachel* v. *United States* (8 Cir.) 61 F. 2d 360, 362.

Moreover, it appears that in each and every instance, the Court must first determine, if the plea was a voluntary act of the defendant (relator). In this case before the bar, it cannot be contended that the plea was of a voluntary nature.

There can be no doubts, that if relator's allegations are true, in that the trial court within the state of New York threatened him into taking the plea of guilty to a crime that he did not commit, the plea of guilty cannot now stand. *United States* v. *Tateo*, 214 F. Supp. 560. And see *United States* v. *Tateo*, 377 U. S. 463.

The alleged affidavit of the assistant District Attorney of Bronx County is not binding on this relator, where there has never been a hearing on the issues in an open court (see dissenting opinion had in the Court of Appeals, 16 N. Y. 2d 493). For the issue raised by this relator requires that a hearing be had on the issues, notwithstanding the fact that the alleged co-defendants later enter a plea of guilty.

Wherefore, under the foregoing, this court should grant this relator the relief sought, or in the interest of justice a hearing to determine the truth of the applications herein and that further, the motion in opposition should in all respect be denied.

Respectfully submitted,

Foster Dash
Foster Dash # 9731
Drawer B
Stormville, New York

(Sworn to by Foster Dash on October 26, 1965.)

Decision of Cannella, J.

CANNELLA, J.

Petitioner's pro se application for a writ of habeas corpus is denied.

Petitioner was indicted together with three defendants for robbery in the first degree, grand larceny and assault on February 9, 1959.

On April 6, 1959, together with one co-defendant, the petitioner pleaded guilty to robbery in the second degree and was sentenced as a second offender to a term of 8 to 12 years on August 3, 1959. Two separate coram nobis applications were denied on January 29, 1963 and February 26, 1963, respectively. The grounds raised are similar to the ones raised in this petition. The orders were affirmed by the Appellate Division, First Department, 21 A. D. 2d 978, and affirmed by the New York Court of Appeals, 16 N. Y. 2d 493.

Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession; (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of the proceedings against the defendant. *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965); *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

With respect to the second contention is appears that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See, *People* v. *Dash,* 16 N. Y. 2d 493 (1965).

Further the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him.

So ordered.

Dated: February 2, 1966.

JOHN M. CANNELLA,
U.S.D.J.

Motion for Certificate of Probable Cause.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

Foster Dash, plaintiff-appellant, being duly sworn, deposes and says that he makes this motion for a Certificate of Probable Cause in forma pauperis from an Order of the United States District Court, Southern District of New York, filed in the clerk's office on February 2, 1966, denying his petition for a writ of habeas corpus, verified Oct. 4, 1965.

That the issues raised in plaintiff's petition were that, 1. his plea of guilty was involuntary and was the product of an unconstitutionally obtained confession, and 2. that he was prejudiced in that the trial court threatened him before the entry of said plea.

That the said District Court denied plaintiff his constitutional rights by denying his petition saying that his plea of guilty was voluntary (*United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1518 (2d Cir. 1965); *United States ex*

rel. Swanson v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965; *United States ex rel. Brucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965); and that the authorities cited by the District Court in denying plaintiff, were not subjected to such coercive methods—after indictment—and therefore are not applicable nor are they binding on plaintiff.

That it is established by the records of this case that not only was plaintiff's confession had unconstitutionally, but all of the methods leading up to the signing of said confession, as well as the confession itself, was unconstitutional. Said unconstitutional methods are listed in the order as they happened.

1. The illegal search and seizure of plaintiff in violation of the 4th amendment to the U. S. Const., and *Mapp* v. *Ohio,* 367 U. S. 643.

2. Being transported from one police station to another, then to the district attorney's office instead of first being brought before a magistrate as is required by law (See, Sec. 165, Code Cr. Proc. and *People ex rel. Gow* v. *Bingham,* 1907, 57 Misc. 66, 107 N.Y.S. 1101, 21 N. Y. Ct. R. 559; *People* v. *Gallo,* 1955, 207 Misc. 161, 140 N.Y.S. 2d 89), and is violative of the due process and equal protection of the law clauses to the U. S. Constitution (5th and 14th amendments.)

3. Being denied due process and equal protection (5th & 14th amdt. U. S. Const.) by a 9-hour delay in arraignment for the purpose of beating and coercing a confession from plaintiff. (See, Sec. 165, Code Cr. Proc. and *Mallory* v. *United States,* 354 U. S. 499; *People* v. *Kelley,* 1959, 8 A. D. 2d 478, 188 N.Y.S. 2d 633; *People* v. *Alex,* 265 N. Y. 192 N. E. 289, 290, 94 A.L.R. 1033.

Motion for Certificate of Probable Cause.

4. Being denied due process and equal protection clauses (5th & 14th amdt.) to the U. S. Constitution by extorting and coercing a confession from relator—after indictment—and without counsel. (See, Sec. 274, Code Cr. Proc. and *People* v. *Waterman,* 216 N. Y. 2d 70.

5. Denied due process and equal protection of law (5th & 14th Amdt., U. S. Const.) by the district attorney amending the "John Doe" indictment in his office by crossing out the fictitious name "John Doe" and writing plaintiff's name, Foster Dash, in its place after obtaining said confession. (See, Sec. 275-277-293, Code Cr. Proc. and *Lee Gim Bor* v. *Ferrari,* 55 F. 2d 86) and only the Court had such authority to amend indictments. *People* v. *Cook,* 197 A. D. 155, 188 N.Y.S. 291; aff. N. Y. 505, 142 N. E. 260; *Baldwin* v. *Rice,* 147 A. D. 347, 131 N.Y.S. 785. (See, also, Sec. 295-J and 295-K, Code Cr. Proc.)

6. Denied due process and equal protection of law (5th & 14th Amdt., U. S. Const.) in that plaintiff asked for and was denied the assistance of counsel throughout these illegal and unconstitutional proceedings which was violative of the 6th amendment to the U. S. Constitution and that these were critical stages of the proceedings against plaintiff. See, *Escobeda* v. *Illinois,* 12 L. Ed. 2d 977 (1964); *Massiah* v. *United States,* 377 U. S. 201 (1964); *Gideon* v. *Wainwright,* 372 U. S. 335 (1962).

7. For the District Court to say that plaintiffs' confession was voluntary is wholly fictional, for it overlooks the important facts that plaintiff had already been coerced into pleading guilty in the district attorney's office—after indictment and without counsel—and no subsequent assignment of counsel could cure the prejudice that had already

accrued in this case. (See, *Spano* v. *New York,* 360 U. S. 315, 325-26 (1959)) (Douglas, J., concurring) and no remedy was available to him until, *Jackson* v. *Denno,* 12 L. Ed. 2d 908 (1964), which recognized the plight of a defendant in New York faced with the decision whether to challenge the admissibility of a confession, had in violation of the United States Constitution. *Id.* at 922. After all of these coercive and unconstitutional methods, one can imagine a cynical prosecutor saying:

> "Let them have the most illustrious counsel now. They cannot escape the noose. There is nothing that counsel can do for them at trial." *Ex parte Sullivan,* 107 F. Supp. 514, 517-518; *Eccobedo* v. *Illinois, supra.*

8. The threats made by the trial court was not a matter of open record. But how often will a court go on record when it makes a threat to a helpless defendant? The affidavit of the State court prosecutor is not binding on plaintiff for the issues raised requires that a hearing be had (see, dissenting opinion in this case, N.Y.S. Court of Appeals, *People* v. *Dash,* 16 N. Y. 2d 493), and to which he is entitled, *Machibroda* v. *United States,* 368 U. S. 478; *and the legal coercion applied throughout plaintiff's case, as set forth herein, makes it very doubtful that he possessed the "freedom of will" necessary for a voluntary plea of guilty*—Judge Weinfeld in *United States* v. *Tateo,* 377 U. S. 463. (See, also, *United States* v. *Tateo,* 214 F. Supp. 560).

Conclusion

Wherefore, and in view of the above contentions plaintiff-appellant being destitute, respectfully pray that he be granted a Certificate of Probable Cause by this Honorable

Court and assign counsel to protect his constitutional rights and for such other and further relief as justice requires.

Respectfully submitted,

FOSTER DASH #9731
Plaintiff-Appellant Pro Se,
Drawer 3,
Stormville, N. Y.

(Sworn to by Foster Dash, February 23, 1966.)

Order Granting Leave to Appeal Forma Pauperis.

Leave to appeal in forma pauperis and a certificate of probable cause are granted. The Legal Aid Society is assigned as counsel.

JOHN M. CANNELLA,
U.S.D.J.

March 14, 1966.

United States Court of Appeals Order of Reversal.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and sixty-nine.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFORD FEINBERG,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this Court with costs to be taxed against the appellee.

/s/ A. DANIEL FUSARO,
Clerk.

Docket Entries.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, ex rel. McKINLEY WILLIAMS,

Relator,

against

HAROLD W. FOLLETTE, Warden of Green Haven State Prison, Stormville, New York,

Respondent.

Date	*Proceedings*
July 27-66	Filed petition for writ of habeas corpus & order granting the filing thereof without prepayment of fees, etc. application for writ Ret. 8-8-66 Rm. 318—Edelstein, J.
Aug. 22-66	Before Croake, J.—petition submitted—decision reserved
Sep 14-66	Filed petitioner's reply affdvt.
Sep 14-66	Filed petitioner's letter dated 9-5-66.
Sep 14-66	Filed petitioner's affdvt.
Sep 14-66	Filed respondent's notice of appearance.
Sep 14-66	Filed respondent's affdvt.
Sep 14-66	Filed respondent's affdvt by Amy Juviler.
Sep 14-66	Filed memorandum Opinion # 32723—petition for writ is denied—So Ordered—Croake, J
Oct. 27-66	Filed relator's application for reargument of petition for a writ of habeas corpus

Docket Entries.

Oct. 27-66	Filed memorandum Opinion # 32,878—Petition is denied—So ordered—Croake, J. mailed notice
Nov. 22-66	Filed petitioner's notice of appeal—copy to Louis J. Lefkowitz
Nov. 22-66	Filed memo endorsed on certificate of probable cause—The request of the relator in so far as he applies for a certificate of probable cause and leave to appeal in forma pauperis is granted. So ordered—Croake, —.—mailed notice

A True Copy,

JOHN J. OLEAR, Jr.,
Clerk.

By E. SWANCIGER,
Deputy Clerk.

Affidavit of McKinley Williams, in Support of Petition for a Writ of Habeas Corpus.

McKinley Williams, being duly sworn according to law deposes and says:

That he is the relator-petitioner in pro se (hereafter called relator) and makes this affidavit in support of his petition for habeas corpus.

That he invokes the jurisdiction of this Honorable Court under Art. I Section IX Clause (2) of the Constitution of the United States of America; Section XIV of the Judiciary Act of September 24, 1789, I Stat. at L. 73, 81, 82, now embodied in Title XXVIII, Chapter XIV United States Code. (Holdsworth: History of the English Law Vol. IX pp. 108-25) and under the authority of the *Electoral College Case* (F. Cas. No. 4, 336), *Ex Parte Farley* (40 F. 66); and under the amplified scope of the jurisdiction of the Federal Courts as defined in *Rogers* v. *Richmond* (357 U. S. 220, 78 S. Ct. 1356 2 L. Ed. 2d 1361; App. 365 U. S. 534 81 S. Ct. 735 5 L. Ed. 2d 760); *Townsend* v. *Sain* (372 U. S. 293 83 S. Ct. 745, 9 L. Ed. 2d); *Fay* v. *Noia* (372 U. S. 391).

That he comes before this Honorable Court as he will show, without bar to this Court's consideration of the petition for habeas corpus under the rules of Federal-State comity as set forth in Title XXVIII U. S. Code annotated, Chapter Cl. III Section 2254.

Statement of Facts

Relator was charged with 5-felonies in a multi-count indictment returned by the Bronx County Grand Jury, February 6, 1956, and sentenced on a guilty plea entered March 16th, to a charge of robbery in the 2nd°, and committed April 19, 1956, to the Elmira Reception Center, Elmira, New York, for a term of 7½ to 15 years as a first offender.

Affidavit of McKinley Williams.

CHRONOLOGICAL HISTORY OF PRIOR LITIGATION

On August 28, 1964, relator made an application to the Bronx County Supreme Court, for a writ of error coram nobis, to vacate and set aside his conviction of March 16, 1956.

On September 14, 1964, an order was entered in the Bronx County Clerk's office denying the coram nobis application without a hearing.[1]

Timely notice of appeal was filed, and on December 10, 1964, the New York A. D. First Department granted leave to appeal as a poor person; thereafter on February 2, 1966, an order was entered affirming the order of the lower court.

On February 14, 1966, permission was sought to appeal to the New York Court of Appeals, the same being denied by order entered March 16, 1966 (Keating, J.).

QUESTION PRESENTED

CAN THE STATE OF NEW YORK, CONSISTENT WITH THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, DEEM RELATOR'S GUILTY PLEA ENTERED PRIOR TO JACKSON V. DENNO[2], AN INDISPENSIBLE WAIVER OF HIS RIGHT TO CHALLENGE THE INVOLUNTARINESS OF A CONFESSION, EVEN THOUGH UNDER JACKSON V. DENNO, RELATOR AT TRIAL COULD NOT HAVE HAD A FAIR DETERMINATION ON THE ISSUE OF VOLUNTARINESS, AND WHETHER OR NOT SUCH RULING IN THE INSTANT CASE VIOLATED RELATOR'S RIGHT TO DUE PROCESS?

While the issue raised herein bears on a federal question of law under the Constitution, factual questions are similarly involved which would require a hearing to reach a determination thereon.

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[1] True copy of order and opinion of the Bronx County Supreme Court (Lyman, J.), annexed infra, marked 'A', for identification.

[2] 378 U. S. 368 (1964).

Affidavit of McKinley Williams.

It is clear from the holdings of the United States Supreme Court in *Rogers* v. *Richmond,* 357 U. S. 220 (1961); *Townsend* v. *Sain,* 372 U. S. 293 (1963); *Fay* v. *Noia,* 372 U. S. 391 (1963), that the federal courts possess the power to examine state court proceedings and to apply proper constitutional standards in evaluating the determination reached thereunder, and to reach an independent conclusion as to the facts when a prisoner petitions the court to do so.

Judge William H. Becker of the United States District Court, Western District of Missouri, observed:

> "We hold that a federal Court must grant an evidentiary hearing to a habeas corpus applicant under the following circumstances: if . . . (2) the State factual determination is not fairly supported by the record as a whole . . ." (Emphasis supplied)[3]

ARGUMENT*

The argument of the question presented is set forth in toto, in a memorandum of law annexed hereto.

SUMMARY OF THE CASE

Since the relator's utterance of "guilty" on the record in New York in the presence of a lawyer[4], New York's

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[3] Remarks at the judicial conference of the Eighth Circuit at Rochester, Minn. July 25, 26, 1963 (33 Frd. 363, 452, 472) quoting Townsend v. Sain, U. S. 203, 83 S. Ct. 745, 9 L. Ed. 2d at 786.

* A true copy of relator's argument, composed of brief submitted to the New York A. D. 1st Dept., by the Legal Aid Society, and Respondent's opposing brief is annexed and enclosed herewith marked 'B' and 'C' respectively.

[4] On February 10, 1956, relator was appointed counsellor Frazier Davidson, by the Bronx County Court. On January 30, 1962, an

(*footnote continued on following page*)

record would imply that relator's guilt is as overwhelming and conclusive as the probability that the sun will rise tomorrow. But such is not the fact.

On the surface the conviction against relator looks impressive: relator was identified in a public street, in the night time, in New York City some two days after a crime had been committed; that he voluntarily confessed the crime in the police station after arrest; that he pleaded guilty in the presence of a lawyer. Though scrutiny of the alleged identification and circumstances surrounding the alleged confession and guilty plea however indicates the crucial sham of the conviction documented against relator by the State of New York.

The proof in the case shows that there were no witnesses who placed relator at the scene of the alleged crime; no gun was found as alleged in the State's indictment; and, that outside of the existence of an alleged confession attributed to relator in the police station after arrest, there is not one scintilla of circumstantial evidence connecting relator with commission of the alleged crime.

Still on the record, it is revealed, that relator, when arrested was a 20 year old indigent youth, and had resided in New York about 90 days prior to arrest, employed as a truckman's helper; had had previous non-New York arrests—all misdemeanors, but had never before pleaded guilty to a felony or before represented by an attorney.

That relator following arrest on January 25, 1956, was detained at the Bronx police station without booking, on an open charge, not informed of any rights prior or subse-

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(*footnote continued from previous page*)

order was entered in the New York A. D. 1st Dept., disbarring Attorney Frazier Davidson for having induced two Bronx clients to lie about their residence in order to obtain a divorce in South Carolina without going there to live. The disbarment order stated that Mr. Davidson first denied the charge then recanted and confessed to having destroyed his records on the case.

quent to arrest, from 7:00 p.m., while the record[5] claim is, that relator on or about the hour of 1:00 or 2:00 a.m. the next morning confessed, voluntarily to a so-called robbery.

That relator on the initial appearance before the court on the afternoon of March 16th, 1956, refused to accept an offer to plead guilty to a so-called reduced charge of robbery or to enter a guilty plea; but, that following a half-hour extemporaneous out-side-the-court-room-door conference with the assigned counsel Frazier Davidson, relator made a *second* appearance into the court room and entered the guilty plea[6], to a so-called reduced charge of robbery. But relator was not prior to the guilty plea apprised by the court of the consequences of the plea, or of the nature and meaning of the charge.

In this instant case the relator is illegally imprisoned; tyranny and oppression has leveled an illegal, unjust and unconstitutional conviction upon the relator's head. The infirmity in the proceedings which resulted in relator's conviction and in being sentenced to prison, and in presently being barred from showing that a confession attributed to him in the police station after arrest is a false product of coercion and torture, and involuntary, is that the proceedings are ones against the Constitution. From the principles of the laws as set forth herein, as well as the reasons for these principles, which are sustained by all the authori-

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[5] The facts heretofore set forth under *Statement of Facts,* and herein *Summary of the Case,* are undisputed facts on the record, and such record is therefore not submitted here, but the record is subject to judicial notice. (Fed. R. Civ. P. 43).

[6] In 1962, relator, after unsuccessfully seeking to locate Attorney Frazier Davidson and secure an affidavit, filed an application with the court to set aside the conviction on grounds, that Attorney Davidson, had, just prior to the plea, advised the relator that the charge to which the D.A. was allowing the plea was a misdemeanor—not a felony; and that relator did not discover the fact until sentenced on the felony.

ties which declare the law on the subject, the relator McKinley Williams, could not be held in imprisonment and deprived of his liberty under such circumstances and is therefore entitled to immediate release.

CONCLUSION

That relator is a born citizen of the United States, over the age of 21 years and of sound mind; that he executed this petition and the annexed papers at Green Haven State Prison; that he knows the contents thereof; and that he believes the same to be true.

PRAYER

WHEREFORE RELATOR HUMBLY PRAYS, that this Honorable Court for all the reasons set forth herein, and in the annexed memorandum of law, issue and sustain a writ of habeas corpus commanding the respondent warden to produce relator before this Court on a day and at a time certain to be named; that an evidentiary hearing be had with the State records made available to sustain the position of relator; and on the result of such hearing the writ of issue, and relator ordered discharged from respondents custody and remanded to the jurisdiction of the Bronx County Authority for disposition in accordance with the order of this Court, and grant such further relief as justice requires to secure to relator the rights guaranteed to him under the laws of this people.

Dated: July 8, 1966.

Respectfully Presented by,

MCKINLEY WILLIAMS #10591,
Relator-Petitioner, Pro se.

(Sworn to by McKinley Williams July 18, 1966.)

Memorandum of Law.

Introduction

This is a memorandum of law arguing in support of a petition for a writ of habeas corpus to secure an order directing that relator-petitioner (hereinafter called relator) be discharged forthwith from further illegal custody in the State of New York held under a judgment of conviction obtained in direct violation of the Constitution of the United States of America.

A fact-finding evidentiary hearing is sought in this Court, with the production of the State records, to adequately determine the issues raised herein under the Federal Constitution; that the relator be removed from further illegal custody of the herein respondent agent *pendente lite,* to the Federal House of Detention at West Street, New York, N. Y.

The federal question was properly raised in the State Courts although a fact-finding hearing has been denied; and ergo, there is no State Court record of factual determination to be evaluated, only the conclusions of the State Court Judge. Wherefore relator is entitled to an independent hearing in this Court where—as here—the State Court determination affects a denial of Constitutional due process. (*Townsend* v. *Sain,* 372 U. S. 293 (1963); (*Fay* v. *Noia,* 372 U. S. 391 (1963)).

As heretofore alleged (and fully substantiated by documentary proof of the State's record): a pre-indictment confession forms the base, and evidentiary pith of the indictment and guilty plea upon which the relator's conviction is grounded.

But the relator will herein demonstrate to this United States District Court, and prove, that his guilty plea cannot be deemed a waiver of his guaranteed right to Constitutional due process; and that notwithstanding such guilty plea relator is not precluded from proving that such

confession was involuntarily procured in violation of due process contrary to the Federal Constitution.

CAN THE STATE OF NEW YORK, CONSISTENT WITH THE 14TH AMENDMENT TO THE UNITED STATES CONSITUTION, DEEM RELATOR'S GUILTY PLEA ENTERED PRIOR TO JACKSON V. DENNO[1], AN INDISPENSIBLE WAIVER OF HIS RIGHTS TO CHALLENGE THE INVOLUNTARINESS OF A CONFESSION, EVEN THOUGH UNDER JACKSON V. DENNO, RELATOR AT TRIAL COULD NOT HAVE HAD A FAIR DETERMINATION ON THE ISSUE OF VOLUNTARINESS, AND WHETHER OR NOT SUCH RULING IN THE INSTANT CASE VIOLATED RELATOR'S RIGHT TO DUE PROCESS?

By petition dated August 28, 1964, relator sought to have his conviction vacated and set aside in the State Courts on grounds that the judgment is predicated on a confession obtained in violation of due process under the 14th U.S.C.A. in that the confession was obtained by coercion and duress, and while relator was without counsel and before he had been advised of his rights; and that because of the existence of the involuntary confession relator could not possibly have had a fair trial under the indictment.

In rebuttal, the State's Prosecutor argued, "that relator by pleading guilty under the indictment is deemed to have waived his right to put in issue the legality of the admissions that he had made prior to his plea," citing *People* v. *Nicholson* (11 N. Y. 2d 1067). Thereafter, relator's application was denied by order of the Bronx County Court.[2]

People v. *Nicholson, supra,* was decided by the New York Court of Appeals in 1962, and is authority for the proposition that a defendant who has pled guilty while represented by counsel cannot subsequently collaterally attack the

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[1] 378 U. S. 368 (1964).

[2] Copy of County Supreme Court decision annexed infra, marked 'A'.

voluntariness of the confession which was used during his trial.

On April 22, 1965, the New York Court of Appeals reaffirmed it's *Nicholoson* mandate, holding: "That a plea of guilty waives any objection to the manner in which the confession was obtained." *People* v. *Dash* (16 N. Y. 2d 493).

Moreover, at the time of relator's indictment and conviction on March 16, 1956, the general rule repeatedly adhered to in the decisions of the New York Court's was, that the voluntariness of a confession was a question of fact for consideration by the jury to be resolved along with the issue of guilt or innocence. *Balbo* v. *People* (80 N. Y. 484); *People* v. *Vargas* (7 N. Y. 2d 555); *People* v. *Lane* (10 N. Y. 2d 347); *People* v. *Everett* (10 2d 500).

On June 23, 1964, the United States Supreme Court in the case of *United States ex rel. Jackson* v. *Denno* (378 U. S. 368), condemned as unconstitutional New York's method for determining the involuntariness of confessions in that the method was fundamentally unfair, and violated due process.

In January 1965, the New York Court of Appeals gave the Jackson decision retroactive effect in New York by promulgating the opinion in the case of *People* v. *Huntley* (15 N. Y. 2d 72).

Accordingly, the relator contends that his guilty plea cannot be deemed a waiver of his right to challenge the involuntariness of the pre-indictment confession, since under *Jackson* v. *Denno, supra,* relator at trial, could not have had a fair determination on the issue of voluntariness nor a fair trial; and ergo, relator in effect by pleading guilty did not waive any genuine and valid right, since a waiver of an unfair procedure constitutes no waiver *at all.*

The relator further submits, that the State's former pre-*Jackson* procedure formed only a "hollow" right, without a warranty of fundamental fairness (sic) contrary to due

process of law under the 14th Amendment, and it follows, that relator by pleading guilty, cannot be deemed to have waived any "genuine" right under the 14th Amendment, where the right, if effected, could only have resulted in an unfair determination. But, the result is *non sequitur,* where a so-called "waiver" of a fundamentally unfair process, repugnant to due process, is "deemed" to be a "waiver," when equated with a "waiver" of a "right" guaranteeing fundamental fairness consistent with due process.

Although relator could have went to trial and challenged the confession to seek to have it declared involuntary; but his failure to do so cannot foreclose a contemporary challenge, merely by presupposing a vague waiver when it is perfectly plain from the dicta of *Jackson* v. *Denno,* that under the State's futile procedure no fair result would have followed even if the initial challenge had been made.

In this instance moreover, the relator was cast into a pre-trial form of limbo, in that he could not have had a fair trial because of the mere existence of the confession and at the same time could not have had a fair determination on seeking to void it from the case as a preliminary guarantee to a fair trial.

An accused thus cast into such an unfair pre-trial dilemma, and the state court's fail to redress the unfairness; and where, a confession does exist, but a challenge would show it to be involuntarily procured, and it cannot be said that the same result would follow, then the universal sense of justice would be shocked if the due process clause of the Constitution—*the law of the land*—offered no redress in such situation.

This case stands on its own facts—as do all other due process cases—and cannot be summarily judged by rigid, pre-formulated rules. *Betts* v. *Brady* (62 S. Ct. 1252, 316 U. S. 455, 86 L. Ed. 1595 (1942).

The New York Courts refused to appraise the totality of facts, but rigidly held that, since, based on the case of

People v. *Nicholson, supra,* relator pleaded guilty with a lawyer at his side, he cannot demonstrate and prove in a New York Court, that the confession was involuntarily procured by torture (notwithstanding that the same is false and the sole evidence connecting relator with an alleged crime). The crass and flagrant injustice akin to this strait-jacket dogma makes a mockery of "that fundamental fairness essential to the very concept of justice." *Payne* v. *Arkansas* (78 S. Ct. 844, 356 U. S. 560, 2 L. Ed. 975, 1958). In the present case, the ends of justice were thwarted not by the relator's own action; but, that relator was prevented from having a fair trial by the State's own whilom procedure. The question however, should not be How a fair trial was denied, but IF a fair trial was denied!

> "The Fourteenth Amendment is a protection against criminal trials in State Courts conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice, and in a way that necessarily prevents a fair trial." *Lyons* v. *Oklahoma* (64 S. Ct. 1208, 322 U. S. 596, 88 L. Ed. 1481).

Is relator McKinley Williams' plea of guilty to a basically unfair procedure, notoriously repugnant to due process, a waiver of his Constitutional right to be afforded due process of law in the State of New York?

Can a party waive a right when its effect is to put in motion an unfair process and effect an inevitably unfair determination?

The Nation's highest Court has held as basic to our system of jurisprudence the right of a person accused to have a fair trial—"a right to his day in Court," *Re Oliver* (68 S. Ct. 499, 333 U. S. 257, 92 L. Ed. 682 (1948); and such right or the fundamental requisites to the pro-

ceedings which make up the right cannot be waived, unless based an a fundamentally fair process, consonant with due process; and only by the party involved, with an intelligent and knowing intention to relinquish it. Further, as in the waiver of the assistance of counsel, if the right to challenge the involuntariness of the confession is to be waived, *it would be better for it to appear upon the record. Johnson* v. *Zerbst* (58 S. Ct. 1019, 305 U. S. 458, 82 L. Ed. 682 (1938).

Here moreover, the use of the "term" "waiver" falls readily within the "bad" type categorized by Mr. Justice Black in the majority opinion in *Green* v. *Illinois* (246 U. S. 184 (1957):

> "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right."

To therefore, under the *de novo* procedure laid down in *Jackson* v. *Denno,* deny relator the right to show the involuntariness of a confession, attributed to him in the police station, after arrest, by superimposing a procrustean waiver upon his guilty plea violates that *fundamental fairness essential to the very concept of justice,* guaranteed relator pursuant to the due process and equal protection clauses of the 14th Amenndment to the Constitution of the United States and (sic) deprives the relator of his liberty without due process of law.

Accordingly, for the reasons articulated, and in the interests of justice, relator should be granted an opportunity to challenge the confession, consistent with due process as enunciated in *Jackson* v. *Denno, supra,* to lay a corresponding prerequisite base for guaranteeing relator a fair trial, which relator could not have had prior to the advent of *Jackson* v. *Denno, supra.*

CONCLUSION

Asking Court to review all papers included by relator and a hearing should be ordered (3) and the relief prayed for should in all respects be granted.

Dated: July 8, 1966.

McKINLEY WILLIAMS,
Relator-Petitioner, *Pro se.*

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

McKINLEY WILLIAMS, being duly sworn according to law deposes and says, that he is the relator-petitioner above named, and the author of foregoing petition and knows the contents thereof, and that he believes the same to be true.

McKINLEY WILLIAMS.

Exhibit "A".

SUPREME COURT,
COUNTY OF BRONX.
SPECIAL AND TRIAL TERM PART XII

File Number 118 1956

Motion for: Vacate Judgment of Conviction

Submitted 9/14/64

Present: Hon. WILLIAM LYMAN, County Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

against

McKINLEY WILLIAMS,

	Defendant. Papers Numbered
Notice of Motion and Affidavit Annexed	1
Answering Affidavits	2

Upon the foregoing papers this motion is in all respects denied. Defendant moves to vacate the judgment of April 19, 1956 convicting him on his plea of guilty of robbery, second degree, upon an indictment for robbery, first degree, whereunder he was sentenced to the Elmira Reception Center for a term of 7½ to 15 years by County Judge Eugene G. Schulz. Defendant presently contends that he was illegally arrested on a public street, brought to a police precinct where he was questioned without aid of counsel, without having been informed of his right to legal

assistance and not having been advised of his right to remain silent; that he was intimidated, terrorized and coerced into making admissions of guilt as to a two day old alleged robbery. He further alleges that he was not arraigned in court until about 19 hours after his arrest and, moreover that counsel who represented him in the indictment proceedings was inadequate and incompetent. Relief is urged herein upon the basis of two United States Supreme Court decisions, i.e. Escobedo v. Illinois and Jackson v. Denno, both decided June 23, 1964, and relating to involuntary confessions. In Escobedo, supra, defendant's counsel had been denied access to him by the police during his interrogation and is clearly distinguishable from the instant case. Besides the issue of a forced confession may not be raised under coram nobis (People v. Howard, 12 N. Y. 2d 65). Furthermore defendant waived this issue by his plea of guilty (People v. Nicholson, 11 N. Y. 2d 1067). The preliminary hearing mandated by Jackson v. Denno, supra, is not retroactive (People v. Milford, Sup. Ct. N. Y. County, Postel, J., N.Y.L.J. 8/26/64), undue delay in arraignment after a legal or illegal arrest may not be reviewed by way of coram nobis (People v. Fairfield, 16 A. D. 2d 992) and finally, there is no showing of incompetency of counsel (People v. Tomaselli, 7 N. Y. 2d 350; People v. Brown, 7 N. Y. 2d 359).

September 14, 1964.

/s/ W. L.,
J. S. C.

Certified by Clerk of Bronx County,
September 14, 1964.

/s/ JOHN J. HANLEY.

Affidavit of Murray Sylvester in Opposition.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MURRAY SYLVESTER, being duly sworn, says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent herein. I make this affidavit in opposition to petitioner's application for a writ of habeas corpus on information and belief based upon telephone conversations with the office of the District Attorney of Bronx County and upon records and papers furnished to me.

Petitioner is presently held in custody by the Warden of Green Haven State Prison, Stormville, New York, pursuant to a judgment of conviction rendered in the County Court, Bronx County.

Petitioner pleaded guilty on March 16, 1956 to robbery in the second degree. He was sentenced on April 19, 1956 to imprisonment for a term of not less than 7½ nor more than 15 years (EUGENE G. SCHULZ, J.). A copy of petitioner's fingerprint record furnished by the State Department of Correction is attached hereto and marked Exhibit "A".

The Issues

Petitioner contends that his federally protected rights were violated because he made an involuntary confession before he pleaded guilty. He contends that, following *Jackson* v. *Denno,* 378 U. S. 368, the confession would have to be set aside and apparently concludes therefrom that his plea of guilty and conviction would thereupon be declared void and he be set at liberty (Affidavit in support of petition, p. 3 of petitioner's papers). Respondent contends that invalidity of the confession, even if shown, would not avoid the conviction upon petitioner's guilty plea.

Affidavit of Murray Sylvester.

Respondent also contends that the pendency of petitioner's appeal from denial of *coram nobis*, in New York should bar consideration of this application.

Prior Proceedings

According to the office of the District Attorney of Bronx County, petitioner has brought six *coram nobis* proceedings in the State of New York, attacking his conviction. All of these were decided adversely to him at Special Term. He appealed four of them and received affirmance of three of them. His fourth appeal, which was from a denial by the New York Supreme Court, on November 30, 1964, of his application for a writ of *coram nobis* to set aside the conviction which he attacks herein, is presently pending in the Appellate Division of the Supreme Court, First Department.

The issue raised by petitioner herein was raised in the Supreme Court of New York, along with other issues, and determined adversely to petitioner in a decision by Mr. Justice Lyman dated September 14, 1964, a copy of which is attached to petitioner's papers and marked Exhibit "A" (following page 12 petitioner's papers). This decision was affirmed upon appeal.

POINT I

EVEN IF THE CONFESSION WERE SHOWN TO HAVE BEEN INVOLUNTARY THE PLEA OF GUILTY IS SHOWN TO HAVE BEEN COERCED AND FURNISHES A CONSTITUTIONAL BASIS FOR THE CONVICTION.

Petitioner's confession was not used as a basis for his conviction. Accordingly his attack on the validity of the confession is not material. As the Supreme Court of the United States said in *Townsend* v. *Burke*, 334 U. S. 736 at

page 738:

"In this present case no confession was used because the plea of guilty in open court dispensed with proof of the crime. Hence, lawfulness of the detention is not a factor in determining admissibility of any confession and if he were temporarily detained illegally, it would have no bearing on the validity of his present confinement based on his plea of guilty, particularly since he makes no allegation that it induced the plea."

Point II

THE PENDENCY OF PROCEEDINGS IN NEW YORK STATE BY PETITIONER TO SET ASIDE THE CONVICTION HEREIN ATTACKED BARS THE APPLICATION HEREIN.

There is presently pending in the Appellate Division, First Department, New York State Supreme Court, an undetermined appeal by petitioner from a denial of a *coram nobis* writ addressed to the same conviction which he attacks herein. In such a situation this Court has denied relief, such as petitioner now asks, which could be made unnecessary by the New York proceedings. *U. S. ex rel. Eastman* v. *Fay,* 62 Civ. 3633, S.D.N.Y., November 27, 1962, wherein the Court stated, per WEINFELD, D.J.

"Moreover, it appears that there is presently pending in the Appellate Division, Second Department, of the New York State Supreme Court an appeal by petitioner from the denial of his most recent application there for a writ of error coram nobis which he applied for following the determination of Mapp v. Ohio. While it is true that the writ there was applied for upon search and seizure grounds, a distinction which petitioner stresses, the fact is that if his appeal is up-

held it would necessarily result in the vactur of the judgment of conviction. Accordingly, it appears that petitioner has not exhausted his available state remedies."

See also *U. S. ex rel. Ellington* v. *Follette*, 65 Civ. 3287, S.D.N.Y., April 12, 1966 (TYLER, D.J.).

Conclusion

It is respectfully submitted that petitioner has not asserted facts which, if true, would sustain a writ of habeas corpus. In any event petitioner's application should be denied because of the pendency of the New York proceedings.

WHEREFORE, the respondent prays that the petitioner's application for a writ of habeas corpus be in all respects denied.

(Sworn to by Murray Sylvester on August 18, 1966.)

Exhibit A, Annexed to Foregoing Affidavit.

D. McGINNIS
MMISSIONER

August 11, 1966
CONFIDENTIAL

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DIVISION OF IDENTIFICATION
ALBANY, N. Y. (12225)

This certifies that fingerprints of the following named subject have been compared and the following is a true copy of the records of this Division.

PAUL D. McGINNIS

I. No. 565632X B M 5 8 1936

ntributors of ngerprints	Name and Number	Arrested or Received	Charge	Disposition
Columbus Ohio	McKinley Williams 7812	6-21-54	PL	$25/$7.
Columbus Ohio	McKinley Williams 44324	6-19-54	Pet Larc	6-21-54 $25 & costs
Middletown	McKinley Williams 4164	8-8-54	Invest	released
Dayton Ohio	McKinley Williams 29345	8-18-54	drk & CCW	8-18-54 & 8-20-54 $10 & C susp all ½ mos in WH comm confiscate weapon
n Corr Farm n Ohio	Williams McKinley 111-084	8-20-54	CCW	3 mos
Dayton Ohio	William McKinley 29 345	11-23-54	inv larc by trick	11-23-54, $50 & C $ 30das. Comm WH
Wkhse.	—(Rpt. Rec. Ctr.)	8-20-54	CDW 3Mos.	on chg of larc by trick
n Corr Farm n Ohio	McKinley Williams 112-679	11-23-54	fraud obt money	59.40 & 30das.
Columbus Ohio	McKinley Williams 44324	1-6-55	Inv. Gr. Larc. #2 Petit Larc.	Inv. lifted & $50 & Costs 1-8-55
Columbus Ohio	McKinley Williams 44324	2-8-55	inv GL PL	2-10-55 lifted (2) 30das. WH $10
Columbus Ohio	McKinley Williams 44324	5-10-55	vag (2) resisting	& C (1) $10. (2) $10. & C

Represents notations unsupported by fingerprints in D.C.I. files.

ase advise if we can be of any further assistance to you in this matter.

Exhibit A, Annexed to Foregoing Affidavit.

Contributors of Fingerprints	Name and Number	Arrested or Received	Charge	Disposition
*PD, Dayton Ohio	McKinley Williams 29345	6-16-55	inv L by trick	6-17-55 $50 & 30das. Comm. on chg. of frau practice
*PD, Mansfield Ohio (Rpt. Wash. Bur.)	McKinley Williams 853	9-29-55	dr on expired registration	$10 & costs
NYC PD 41Pct 190	McKinley Williams 1—Kinny Williams 369392	1-25-56	Rape Deg. Asslt. & Robb., 1899 (Toy Gun)	1-29-56 Reception Center
Probation Dept. Co. Crt. Bronx, NY	McKinley Williams	Prts. recd. 3-20-56	Robbery 1st P. G.to Robbery 2nd 3-16-56	
Reception Center Elmira, N. Y.	McKinley Williams 13762	sent. 4-19-56 recd. 4-24-56	Conf Robb 2nd	7-6-0/15-0-0 (Bronx Co.) 6-25-56 #1466 Trans. to Attica

Reply Affidavit of McKinley Williams.

McKinley Williams, under the penalty of perjury deposes and says:

That he is the Relator-Petitioner (afterwards called Relator) in the instant action and makes this reply to an opposing affidavit by the counsel for the Respondent, Asst. Atty.-Gen. Murray Sylvester, dated August 18, 1966.

For the first time the State proposes in opposition: 1. (Point I) That it's Court rulings[1] be up-held by this Federal Court on the theory "that a showing of involuntariness of the confession is an immaterial issue to the conviction being had" and; 2. (Point II) That based upon information and belief and a telephone conversation with a party in the Bronx County D. A.'s office relator has an appeal pending in the New York Appellate Division and therefore his federal habeas petition should be summarily denied.

Relator's reply to the statements appear in the order listed.

(Point I)

1. The sole issue before this United States District Court, sought to be determined, is the New York Court ruling denying relator the right to challenge the involuntariness of the confession, and holding: "That it is deemed that relator 'waived' his right to challenge the confession." (See: Relator's Petition pgs. 8, 9). Any other issues are collateral, and subject to determination on a separate and independent adjudication.

The analogy to Townsend v. Burke (334 U. S. 736), is inapposite. There the defendant could *not* have been de-

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[1] Order of Bronx C. Sup. Ct. dated September 14, 10y4, denying coram nobis application. (Lyman, J.). Affirmed App. Div. February 2, 1966. (See: Relator's Petition Exhibit 'A').

prived of a fair trial, because the State's procedure afforder, by law, a fair method of determining the issue of voluntariness of a post-arrest confession. And the defendant, at trial could therefore have a fair determination on such issue.

> Under Illinois law the admissibility of the confession is determined solely by the trial judge, but the question of voluntariness, because it bears on the issue of credibility, may *also* be presented to the jury. See, e.g., *People* v. *Schwartz,* 3 Ill. 2d 520, 523, 121 N. E. 2d 658, 760; *People* v. *Roach,* 369 Ill. 95, 15 N. E. 2d 863.

(Moreover the defendant there sought to avoid the confession merely because of a delay in his arraignment, having on bearing on reliability as to form the predicate of a "hollow" guilty plea.)

In the present case however, the relator could *not* have had a fair trial because the State's procedure, by law, denied a fair determination on the issue of the voluntariness of the confession. *Jackson* v. *Denno,* 378 U. S. 368 (1964).

(Point II)

2. Under the penalty of perjury relator affirms that he has made *no* application to the New York Appellate Division, First Department, as the conditional prerequisite to seeking an appellate reivew (N. Y. C.P.L.R. §§ 1101, 1102). Annexed hereto marked 'D' for identification, is a true copy of a letter from the office of the Clerk of the Appellate Division confirming the facts.

Knowing that relator *has* exhausted his state court remedies the Respondents do not allege otherwise; rather, they proceed by indirection, citing two federal court deci-

sions which may imply as much, but are of such tenuous and remote analogy that further comment is unwarranted.

Suffice it to say in *arguendo* however, that since the so-called pending First Department action is admittedly the same as the present one, and the former was instituted subsequent to the present petition (and there is no claim that this present is not properly before this Court) then the outcome of the former state action would be academic.

Miscellaneous

(a) Two (2) applications to inspect grand jury minutes, denied and not appealable; all lumped under "label" *coram nobis* to total six. (Respondent's affidavit p. 2, par. 3).

(b) Relator could not possibly have been arrested and committed to the New York City workhouse on the 8-20-54, for a charge of CDW (Carrying Dangerous Weapon) as noted: Respondent's Ex. 'A', Line 8. Because on that same day August 20, 1954, relator was arrested in Dayton, Ohio, for possessing a so-called concealed weapon—a pocket knife, and thereafter served a 90-day prison term as the record itself indicates.

Conclusion

To even postulate a conclusion that relator is entitled to no relief after a showing and proving of involuntariness, as a capstone to denying the instant relief sought in this Court, is to offend the common sense of mankind with a proposition too preposterous for serious belief.

Wherefore Relator Humbly Prays, that this Honorable Court, for the reasons culled and articulated herein and those set forth in his petition, issue and sustain a writ of habeas corpus and that this Court grant such further

relief as justice requires to secure to relator the rights guaranteed to him under the laws of this people.

Dated: August 29, 1966.

Respectfully Presented by

McKinley Williams,
Relator-Petitioner, pro se,

McKinley Williams,
No. 10591
Drawer B,
Stormville, New York 12582.

cc:

Louis J. Lefkowitz, Esq.,
Attorney General of the
State of New York,
Attorney of the Respondent,
80 Centre Street,
New York, N. Y. 10013.

Opinion of the District Court.

CROAKE, District Judge

MEMORANDUM

In a memorandum decision filed on September 13, 1966, the petition of the relator for a writ of habeas corpus was dismissed by this court for failure to exhaust state remedies. Relator now moves for reargument. Since it appears from the additional papers filed upon the instant application that the exhaustion requirement should be held to have been complied with in the circumstances, the motion for reargument will be granted. The September 13 order is to be vacated and the petition will be considered upon the merits.

In his petition, relator urges that his conviction be set aside on the grounds that a confession was coerced prior to his plea of guilty, and that he should not be deemed to have waived his right to challenge the confession, because, under the then existing procedure for determining the voluntariness of confessions, he could not have had a fair trial. Relator supports this ingenious argument by relying on *Jackson* v. *Denno,* 278 U. S. 368 (1964), the case which invalidated the New York procedure for determining the voluntariness of confessions.[1]

The arguments in support of the application have been carefully considered and it appears that the petition should

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[1] The ingenuity of the relator is further evidenced by the manner in which he "satisfied" the requirement that state remedies be exhausted before seeking relief in federal court. When the petition to this court was originally filed, the affidavit of the attorney general stated that petitioner had an appeal from the denial of a coram nobis application pending in the New York courts. To verify this, the court, sua sponte, requested an affidavit from the attorney general. The attorney general complied, and together with an affidavit submitted a photostatic copy of the notice of appeal. The relator received a copy of the affidavit and of the notice of appeal, whereupon he forthwith withdrew the pending appeal. Parenthetically, it might be observed that the relator has brought six coram nobis proceedings in the New York courts.

be and is denied. As the court of appeals said in *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018, 1019 (2d Cir. 1965): "A voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." *Accord, United States ex rel. Martin* v. *Fay,* 352 F. 2d 418 (2d Cir. 1965). Under the circumstances alleged herein, this court is of the opinion that the plea of the relator was not involuntary. It is clear from the papers submitted that the disputed plea was made in open court with counsel present.[2]

It should be further noted that the plea of guilty by this relator was made in March 1956, some eight years before the *Jackson* decision (1964), in which the procedure then pursued in the New York courts to determine the voluntariness of a confession was declared unconstitutional.[3] It is most difficult, therefore, to accept the assertion that the right to go to trial was relinquished because he believed he would not receive a fair determination on the issue of voluntariness.

Accordingly, the petition is denied.

So Ordered.

Dated: New York, N. Y., October 26, 1966.

Thomas F. Croake
Thomas F. Croake

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[2] The assertion by the relator that his attorney informed him that he would be pleading guilty to a misdemeanor rather than to a felony is not sufficient for this court to grant the relator's request for relief, in light of the decision in *Martin, supra,* of the colloquy between the court and the defendant at the time of the plea, and of the prior experience of the relator with the law as indicated by his record.

[3] *People* v. *Huntley,* 15 N. Y. 2d 72 (1965), the case which implemented *Jackson* v. *Denno,* provides for a separate hearing on the issue of voluntariness only as to those cases which have gone to trial.

Order Granting Motion to Appeal Forma Pauperis.

The request of the relator in so far as he applies for a certificate of probable cause and leave to appeal in forma pauperis is granted.

So Ordered.

Dated: New York, N. Y., November 21, 1966.

S/ Thomas F. Croake
Thomas F. Croake
U. S. D. J.

United States Court of Appeals Order of Reversal.

UNITED STATES COURT OF APPEALS,
Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March, one thousand nine hundred and sixty-nine.

Present: Hon. J. Edward Lumbard,
Chief Judge,
Hon. J. Joseph Smith,
Hon. Robert P. Anderson,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

United States Court of Appeals Order of Reversal.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the instructions contained in the opinion of this Court.

A. Daniel Fusaro,
Clerk.

By: Vincent A. Carlin,
Chief Deputy Clerk.

Richardson—Docket Entries.

July 7, 1965—Filed petition for writ of habeas corpus.

December 2, 1965—Denial for application of writ of habeas corpus.

December 10, 1965—Motion for reargument.

December 10, 1965—Denial of motion for reargument.

March 11, 1966—Application for certificate of probable cause and motion for leave to proceed in forma pauperis.

March 11, 1966—Denial by Judge Brennan of application for certificate of probable cause and order directing that notice of appeal be filed without prepayment of fees.

March 11, 1966—Notice of Appeal.

April 7, 1966—Application to the United States Circuit Court of Appeals for the Second Circuit for a certificate of probable cause.

April 7, 1966—Motion for leave to proceed in forma pauperis.

April 7, 1966—Motion for assignment of counsel.

May 18, 1967—Application for certificate of probable cause, leave to proceed in forma pauperis and for assignment of counsel granted.

Petition for Federal Writ of Habeas Corpus.

STATE OF NEW YORK }
COUNTY OF CLINTON } ss.:

To: Honorable Mr. Brennan, Judge of the United States District Court, Northern District of New York.

I Willie Richardson, being duly sworn, deposes and says.

That he is the relator above named in whose behalf this petition is made. That he makes this petition in support of his application for a federal writ of habeas corpus. That this petition respectfully shows to this honorable court and alleges: That relator is presently imprisonment restrained of his liberty in Clinton Prison, Clinton County, New York and the officer or person by whom he is so imprisoned and restrained is one Daniel McMann as warden of Clinton Prison. That relator has not been committed and is not detained by virtue of any judgment decree, final order or process issued by a court or judge have exclusive jurisdiction under the law of the United State or how acquired exclusive jurisdiction by the commencement of legal proceedings in such a court nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, nor the order of such a tribunal made in a special proceeding instituted for any cause execution or other process issued upon such a judgment, degree or final order; nor is he detained and restrained by virtue of any of the provisions specified in Section 1231 of the New York State Civil Practice Act. That the cause as present of said imprisonment and restraint according to the best knowledge and belief of your relator is a judgment of conviction emanting out of the county court of *New York County*, New York City, wherein relator was convicted by a plea of guilty of murder in the second degree and was subsequently

sentence to a term of (30 years to life). That the imprisonment and restraint of relator is illegal and unlawful in said judgment and conviction was had in violation of relators rights is therefore null and void. That your relator has sought relief throughout the state courts and has been denied continuously and that he has exhausted all possible state remedie's before before seeking relief through this honorable court.

On the 10th of December, 1964 relator was granted leave to appeal as a poor person by the Appellate Division First Judicial Department. And counsel was assigned to him. On the 27th of May 1965, the Appellate Division affirmed the judgment of the Court of New York County (Attached hereto and made part of this petition marked Exhibit "A" is a copy of affirmance) on the 8th of June 1965 relator denied a certificate of leave (or granted) to appeal to the Court of Appeals by the honorable M. Dye a judge of the Court of Appeals of the State of New York.

FEDERAL JURISDICTION

That relator having exhausted all possible State Court remedie's now seeks relief through this Honorable Federal District Court which acquires jurisdiction pursuant to Sec. 2291 of title 28 United States Code Subdivision B, whereby federal relief can be sought by a State Court person on a constitutionary invalid conviction as where ever it appears that petitioners constitution rights were impaired in *Fay v. Novia*, 372 U. S. 391, 83 S. Ct. 322, 9 L. Ed. 2d 837. This Court after exhaustive discussions of the questions and the citations of many prior decisions of this Court held that a defendant who had been convicted by use of a coerced confession a State Court could obtain relief in a Federal habeas corpus proceeding notwithstanding the facts of a procedure default in the State Courts which Barred any challenge to the conviction in those courts.

That he makes this petition in his own behalf, relator respectfully request that this Honorable Court kindly bear in mind that he is a layman, not well versed in law, State nor Federal and that if he has any rights as privileges in his behalf for him as to consider those invoked by him in his own behalf although they be unknown to him at present and not specified individually herein.

That the above mentioned conviction upon Relators plea of guilty was had in violation of his constitutional rights and is null and void and that therefore the instant imprisonment and restraint is illegal and unlawful and in violation of his constitutional rights.

ARGUMENT AND FACTS PRESENTED BELOW

On Sunday evening about 2:30 P.M. March 24, 1963 I was picked up on suspicion and complisity concerning a homicide in which two relatives were killed at a dancing party. At the time of the altercation involving these two persons, I was the only other person present and when they drew knives and started stabbing at each other, I tried to stop them and break them apart, but I couldn't, I only succeeded in getting my clothes bloody. So I had to change clothes the police took me to the 126th St. Station House and I tried to explain what happened as far as I knew and showed them my bloody clothes, then they booked me on Homicide. I had asked them to contact an attorney that I knew because I was on parole at the time. They asked me that his name was, and when I told them "they said they had never heard of him" and refused to call or to let me call him. After incessive abuse, threat's and questioning I was finally coerced and forced to sign a confession against my will, implicating myself in something I had nothing to do with, other than being an acquaintance of both persons and attempting to help them

from hurting each other. After I signed the confession they told me that I hadn't been book before. On March 25, 1963 I appeared in court for a hearing, I appeared again on April 16, 1963 and was sent to Belleview Hospital for observation. Then on the 20th of April, 1963 I was informed that I had been indicted for Murder in the First Degree. Six months later on October 9, 1963 I was sentenced to (30 years to life) imprisonment in the State prison by Honorable Justice Pastel of New York County Supreme Court.

"Point One"

Petitioner states the confession was obtained from him by means of abuse and threat of bodily harm and therefore .... (illegible)

before he was forced to confess to something he hadn't done. See People v. Donovan 13 N.Y.S. 2d 148 (1963) which state's that a confession, taken by police, from a person accused of a crime after counsel has been denied access to him; was inadmissible in the trial and further: "confession even if true, if obtained in violation of Section 376, Criminal Code of Procedure, are not sufficient to sustain a conviction, concluding that the judgment be reversed and a new trial ordered."

Petitioner submits that it is established that a plea of guilty induced through concepts that shock the concious mind and which violates defendants constitutional rights of effective and representation, by court assigned counsel, must fare under the provisions of the 14th Amendment, to the constitution. See: Pennsylvania ex rel. Herman vs. Cloudy, 350 U. S. 116 (1956); Gideon vs. Washington, 373 U. S. (1963) and Lyndurn vs. Illinois, U. S. 373 (1963). In the recent case of U. S. vs. Escobedo, the Supreme Court reversed the conviction and held that Gideon vs. Wainwright decision extended the principle and ruled that:

a person is entitled to consult with counsel as soon as investigation makes him a prime suspect. See also Leysa vs. Denno, 347 U. S. 556 A. D.; People vs. Leysa, 1, N. Y. 2d 199, in the case at bar, the illegalally obtained confession is the sole basis of the indictment and judgment of conviction. See: People vs. Evans, 1928, 224 App. Div. 415, 213 N.Y.S. 153, which states: the rights by an accused of a crime cannot and "must" not be denied or disregard." The forcible and compulsary extanlation of an admission in the police station to be used as evidence against a defendant, beyond a doubt comes squarely with the condemanation of both our fundamental and statutory laws—E. G. U. S. (constitution Art. 45, 14) N.Y.S. constitution Art. 1 Sect. 6-12: and the code of criminal procedure—Sect. 395—State Law enforcement officers are constitutionally forbidden to procure evidence of a crime by methods that to "rock and grow" and the bar recognizes no distinction are between real evidence and coerced or forced confessions. Therefore there "must" be other and further evidence which does more than "merely tends to corroborate the trouth of admission or of a confession, because on admission of guilt cannot stand alone. See People vs. Ceuzzo, 292 N. Y. 85.

The very reason behind Sect. 395 Code of Criminal Procedure so to prevent a conviction, where in fact no crime has been committed by the defendant, see: People vs. Louis, 1 NY. 2, 137. Further; in People vs Wallace: 17 AD 2, 951. The court held that; that a statement taken from a defendant by an investigation officer, before arraignment and before being advised of his rights was inadmissible; citing People vs. Waterman, 9, N.Y. 2, 561: and People vs. J. Meyer, 11 N.Y. 2, 162 (People vs Meyer supra). In the case at bar the defendant was interrogated before he was formally charged on indictment without counsel present or without being allowed to contact counsel, although he had

requested same: it is showed that the ruling in Esobedo vs. State of Illinois, 32, LW. 4605-40606, US June 22, 1964, applies here. The question, and constitutional inquiries here in the case at bar is not whether the conduct of the state officers in obtaining the confessions or admissions was shocking, but whether the confession was "free and voluntary" under the circumstances. It should have been extracted by any sort of threat as violence or direct or implied promises. See Hardy vs U. S., 180 U. S. 224, 229 and Smith vs. U. S. 348, U. S. 147-150. In Malloy vs. Hogan, 373 U. S. 948, the Supreme Court held that the 14th Amendment guarantees the petitioner the protection of the Fifth Amendment privilege against self incrimination.

POINT TWO

Even though defendant's assigned counsel did not make the appropriate objections, that fact remains that under all the circumstances justice requires a new trial. See Code of Criminal Procedure, 527 and People vs. Brady, 14 AD 2, 575. In the case of U.S. vs Boyand, 23 Fed. 721 says on timely application, the court will vacate a plea of guilty, shown to have been unfairly obtained through ignorance "fear" or "inadvisement" fundamental to the standard of justice and fairness, implicit in the due process of the 14th Amendment in the requirement that a plea of guilty must be voluntary and understandingly entered—unmotivated by improper inadvisement or coercion in the State of N. Y. The case may be called the Emtiotion and fountain-head of the new concept of adherence to the rights granted every person accused of a crime as provide in the 14th amendment to the U. S. Constitution" which provides in fact, as follows: "nor shall any State deprive any person of his life, liberty or property, without due process of law," the showing in the case at bar, faces easily within

the tradition which requires that a plea of "guilty" not made understandingly and made thru ignorance and "fear" should be vacated. See Leonard vs U. S., 200 F. 2d 690 (c App. 8). The fact that court assigned counsel did not make the appropriate objections came about because he (lawyer) along with the District Attorney coerced petitioner into acceptance of a plea of guilty against his will and then denied petitioner the right to withdraw said plea after consideration. This fact also shown to this Honorable Court why the Court assigned counsel made no efforts to protect petitioner's constitutional and civil rights. See: People vs. Herman, 255 A. D. 314, 7 N.Y.S. 2d 560, which says a fair trial is fundamental requirement in a criminal prosecution, and so, the judgment should be reversed if the trial was not a fair one; however strong may be the evidence against the defendant." Petitioner submits that due to the inadiquacy of effective representation of court assigned counsel, he was deprived of, and not afforded a fair and inpartial trial. See: People vs. Steele, 65 N.Y.S. 2d 2161, (Gen. Sess. 1946) which states "a defendant who is denied due process of law, which the U. S. Constitution guarantees him, is not and cannot be afforded as having a fair and impartial trial".

Conclusion

Petitioner submitts that the United States Constitution; and the laws make in pursuance there of under authority of the U. S. are and shall continue to be the Supreme Law of the land," and shall therefore any violation as infringement of the provision's set fourth in the constitution is a violation of petitioners rights. The fact that petitioner was denied due process of law is such and infringement; and the denial of his rights to with draw his plea of guilty violated Sect. 337 of the criminal code of procedure. That the facts

in this petition can not be denied or refused, for the record with uphold them. That petitioner invokes this honorable court to hold an evidenting hearing with petitioner present in court to inquire into the facts alleged in this petition.

Petitioner prays that a writ of habeas corpus will be issued, Commanding him to be produced before this court together with the time and cause of such illegal judgment vacated, and for such other and further relief as this court may deem just and proper.

Respectfully submitted,

WILLIE RICHARDSON,
39501
Clinton Prison, Pro Se.

(Sworn to by Willie Richardson, July 2, 1965.)

Memorandum Decision and Order, Brennan, J., dated December 2, 1965.

BRENNAN, Judge

This is another of the now prevalent applications for a writ of habeas corpus directed to this court by a state court prisoner and based upon the contention that his plea of guilty to a reduced charge in a state court is invalid because same was induced by an alleged coerced confession.

It is alleged in the petition that on or about March 24, 1963 the petitioner attempted to act as a peacemaker in an altercation between two relatives, each of whom died as the result of stab wounds inflicted upon them. Upon petitioner's arrest, he was brought to the police station

and after questioning, he signed a confession implicating himself in the homicides involved. He alleges in a conclusive manner that his statement or confession resulted directly from police coercion after he had requested and been denied the right to communicate with an attorney. Petitioner was subsequently indicted in a two count indictment which charged him with the crime of murder in the first degree. Two attorneys were assigned as counsel to represent the petitioner and on July 22, 1963 in the presence of such counsel, he entered a plea of guilty to the crime of murder in the second degree upon the first count of the indictment and to cover the second count thereof. He was thereafter sentenced to be confined for from thirty years to life and is detained under the resulting commitment.

On or about June 30, 1964, petitioner sought by motion in the state court to vacate the judgment of conviction upon the contention that his plea was induced by the fact that he had been coerced into confessing his guilt. Relief was on July 27, 1964 denied in the state court upon the authority of Peo. v. Nicholson, 11 N. Y. 2d 1067. An appeal was taken. The action of the lower court was affirmed without opinion on May 27, 1965. Peo. v. Richardson, 23 A. D. 2d 969. Permission to appeal to the Court of Appeals was denied June 8, 1965. This application, verified July 2, 1965, followed.

The present application fails on its face to show that the contention, now advanced, had been presented to the state courts and in order to establish the fact, the petitioner has loaned to this court copies of the appellant's and respondent's brief in the Appellate Division which show that the present contention was in fact submitted to that court. It is therefore concluded that state court remedies have been exhausted.

Memorandum Decision and Order, Brennan, J., dated December 2, 1965.

Through the cooperation of the Attorney General and the District Attorney of the County of New York, a photostat transcript of the minutes of the proceedings in the Supreme Court, New York County, on July 22, 1963, when petitioner's plea was entered and on October 9, 1963, when sentence was imposed, have been made available by the District Attorney of New York County. The petition, together with the documents mentioned above, are before this court in the matter of the determination of the question as to whether the requested writ should issue. They are held to be sufficient to conclude that petitioner's plea was voluntarily entered and that no hearing is necessary. U. S. ex rel. McGrath v. LaVallee, 319 F. 2d 308 at 312 and cases cited. The facts disclosed will be briefly discussed.

As already indicated, the petitioner was represented by assigned counsel at the pertinent times involved. There is no allegation that such representation was ineffective. There is no allegation that petitioner was acting in any manner under either a physical or mental handicap. That petitioner was experienced in the matter of law violations is apparent from the allegation of the petition which contains a reference to him as a parolee at the time of the incident involved.

The transcript of the proceeding had at the time of the entry of the decree is somewhat lengthly and it is difficult to understand from a reading thereof how any court could have taken additional safeguards to make certain that the plea was voluntarily and understandingly entered. Request was made by counsel to withdraw the "not guilty" plea previously entered and to plead guilty to Count 1 of the indictment. After the court requested that the petitioner pay attention, he repeated the request of counsel made above. The petitioner indicated that such course of action was desired by him and that he had discussed same

with both counsel. In answer to the court's question as to whether or not he had been threatened or whether promises had been made to him as to the sentence to be imposed, the petitioner replied in the negative. On two occasions, he advised the court that the taking of the plea was of his "own free will and volition". The court then asked the following question—"Now, did you, on or about March 24, 1963 in the County of New York, wilfully and feloniously strike Rosalie Smith with a knife, thereby causing her death?" The defendant replied "Yes, sir." The court then took the plea. It is impossible for this court to understand how the trial judge could have more conclusively established that the plea of guilty was both understandingly and voluntarily entered. Almost three months later, when sentence was imposed, although opportunity was afforded, the petitioner raised no question as to the validity of his plea. Here the petitioner received the benefit of a plea to a reduced charge and the quashing of a further charge of a capital offense. He is now apparently dissatisfied with the bargain. The circumstances indicate that subsequent post-conviction attempts to obtain relief were the result of an afterthought prompted, no doubt, by legal education afforded during petitioner's subsequent confinement.

The law requires little discussion. This court is not required to blindly accept the allegation of the petition as presumptively valid. Edge v. Wainwright, 347 F. 2d 190. This rule would seem to apply, where a state of mind appears to be contradicted by a showing of the facts. It has long been held that a voluntary guilty plea, entered upon advice of counsel, is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against a defendant in a criminal case. This principle has been recently repeated by our Circuit Court of Appeals in U. S. ex rel. Glenn v. McMann, decided August 26, 1965 and in

Memorandum Decision and Order, Brennan, J., dated December 2, 1965.

U. S. ex rel. Martin v. Fay, decided November 8, 1965. A reference to the option in U. S. ex rel. Glenn v. McMann, supra, would indicate that petitioner's reliance upon the language in U. S. ex rel. Vaughn v. LaVallee, 318 F. 2d 499 is misplaced. The decision here, that the state court record is sufficient and satisfactory for the determination of the issues involved (see U. S. ex rel. McGrath v. LaVallee, supra, at p. 312), may well rest upon the statement found in U. S. ex rel. Martin v. Fay, supra, to the effect that the facts and circumstances including the colloquy between the judge, who took the plea and imposed the sentence, and the petitioner are decisive in denying substance to the petitioner's present contention.

The court's attention is just called to the fact that although the transcript of the state court proceedings, referred to, seems to be a photostat of the original, same is not certified. There is no reason for this court to doubt the correctness or the completeness of such transcript but it is deemed advisable to return same to the District Attorney of New York County with the request that same be certified and returned to this court when it will be filed as a part of the record in this proceeding. The briefs, loaned by the petitioner and referred to above, will be returned to him with the understanding that if an appeal is to be taken from this decision, that same must be made available to the appellate court.

For the reasons indicated above, it is

ORDERED the application be and the same is hereby denied.

STEPHEN W. BRENNAN,
Stephen W. Brennan,
Senior U. S. District Judge.

Dated: December 2, 1965.

Minutes of Plea.

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL AND TRIAL TERM—PART 34

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIE RICHARDSON,

Defendant.

New York, N. Y., July 22, 1963.

Before: HON. GEORGE POSTEL, J.

APPEARANCES:

For the People: ROBERT MCKEEVER, Esq., Assistant District Attorney.

For the defendant: ALFRED I. ROSNER, Esq., WILLIAM P. MCCOOE, Esq.,

Defendant indicted for murder in the first degree.
Indictment filed April 11, 1963.

The Clerk: Your Honor directs at this time the calling of a case, Willie Richardson, in prison?

The Court: Yes.

The Clerk: And counsel, Mr. McCooe and Rosner.

(Defendant brought into the courtroom, where counsel are present.)

The Clerk: A defendant, in prison, Willie Richardson. And counsels, Alfred I. Rosner and William P. McCooe; both counsel present.

(Discussion at the bench off the record among the Court, Mr. McKeever, Mr. Rosner and Mr. McCooe.)

The Clerk: Now, counsel, do you at this time have an application to make to his Honor on behalf of this defendant?

Mr. Rosner: Yes. The defendant, with the permission of the Court and the District Attorney's consent, wishes to withdraw his plea of not guilty heretofore interposed to this indictment pending before this Court now, and to plead guilty to the second count of the indicement to cover both counts. Is the second count the one with—

The Court: Are you talking about Rosalie?

Mr. Rosner: Yes.

The Court: That is under the first count.

Mr. Rosner: I'll take the plea, then—I wish to correct what I said before. The defendant asks leave to plead guilty to the first count of the indictment.

The Court: No.

Mr. Rosner: That's murder—Rosalie—

The Court: You are asking—if I understand you, you want at the present time to withdraw his plea of not guilty, and your wish is to plead guilty to the crime of murder in the second degree—

Mr. Rosner: Second degree.

The Court:—under the first count of the indictment—

Mr. Rosner: That's right.

The Court: —to cover all the counts of the indictment. That's what I understand you to say.

Mr. Rosner: That's right, your Honor.

The Court: Well, do you accept that plea?

Mr. McKeever: That's a plea to murder in the second degree, under the first count of the indictment, to cover the indictment, and to cover all counts of the indictment. The People respectfully recommend the acceptance of that plea to the Court.

The Court: All right. Mr. Richardson, will you pay attention to me please? I understand from your counsel, who are both here, Mr. Rosner and Mr. McCooe, that you now desire to withdraw your plea of not guilty, heretofore entered, and now desire to plead guilty to the crime of murder in the second degree, under the first count of this indictment, to cover both charges and/or counts in this indictment; is that correct?

The Defendant: Yes, sir.

The Court: Now, did you discuss this case fully with Mr. McCooe and Mr. Rosner?

The Defendant: Yes, sir, I did.

The Court: Did you understand them when you spoke to them about your case?

The Defendant: Yes, sir.

The Court: Were you threatened in any manner, shape, or form, by anyone in order to induce you to take this plea?

The Defendant: No, sir.

The Court: Are you taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises been made to you by anyone, that is, your counsel, the District Attorney, the court officers, jail keepers, or anybody, concerning the sentence which this Court, meaning I, will impose in this case?

The Defendant: No, sir.

The Court: You are taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises—without any promises of whatever kind or nature so far as sentence is concerned; is that right?

The Defendant: Yes, sir.

The Court: Now, did you commit this crime?

The Defendant: Yes, sir.

The Court: Now, did you, on or about March 24, 1963 in the County of New York, wilfully and feloniously strike Rosalie Smith with a knife, thereby causing her death?

The Defendant: Yes, sir.

The Court: All right. Take the plea.

The Clerk: If I may most respectfully address your Honor: Does the Court at this time direct that this defendant, Willie Richardson, be advised of the provisions of Section 335-b, subdivision b, of the Code of Criminal Procedure?

The Court: Yes, sir. Will you please advise him.

The Clerk: Willie Richardson, Section 335, subdivision b, of the Code of Criminal Procedure, provides: If you have been previously convicted of crime, that fact may be established, and if you plead guilty or are convicted under this indictment, you may be subject to the additional or different punishment prescribed or expressly authorized by reason of such prior conviction.

And, Mr. Rosner, of counsel, advise the defendant of the legal provisions of said section, namely, 335, subdivision b, of the Code of Criminal Procedure.

Mr. Rosner: Yes.

(Mr. Rosner confers with the defendant.)

The Defendant: Yes.

The Clerk: Now, Willie Richardson, having been advised by counsel, do you fully understand the legal provisions of said section, namely, 335, subdivision b, of the Code of Criminal Procedure? And you, Willie Richardson, the defendant, must personally answer.

The Defendant: Yes.

The Clerk: Speak up.

The Defendant: Yes, sir.

The Clerk: Willie Richardson, do you now withdraw your plea of not guilty, heretofore interposed by you, and do you now plead guilty to the crime of murder in the second degree—

The Defendant: Yes, sir.

The Clerk: —that plea under the first count of the indictment, to cover all the counts in the indictment filed against you? Willie Richardson, is that your plea?

The Defendant: Yes, sir.

(The defendant was sworn, and his pedigree was then taken.)

The Court: The probation department to investigate. Sentence is put over to September 27, 1963.

The Clerk: September 27th for sentence. The probation department to investigate.

ALFRED H. EHRLICH, CSR,
Official Stenographer.

Minutes of Sentence.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

SPECIAL AND TRIAL TERM—PART 40.

Indictment CR-1367-63

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIE RICHARDSON,

Defendant.

SENTENCE

New York, October 9th, 1963.

BEFORE: HON. GEORGE POSTEL, J.

APPEARANCES:

For the People:

THOMAS A. REYNOLDS, Esq., Assistant District Attorney.

For the Defendant:

ALFRED I. ROSNER, Esq. and WILLIAM P. McCOOE, Esq.

Indicted for Murder in the First Degree.
Indictment filed April 11, 1963.
(On July 22, 1963, in Part 34, the defendant pleaded guilty of murder in the second degree, under the first count, to cover the indictment.)

Minutes of Sentence.

The Clerk: Willie Richardson. Mr. Rosner.

(The defendant is brought into the courtroom and stands at the bar.)

The Clerk: Willie Richardson, is that you?

The Defendant: Yes.

The Clerk: Is Mr. Rosner, standing beside you, your attorney?

The Defendant: Yes.

The Clerk: Have you any legal cause to show why the judgment of the Court should not now be pronounced against you according to law?

The Defendant: No.

The Clerk: Do you want your lawyer to speak for you?

The Defendant: Yes, sir.

Mr. Rosner: We respectfully ask your Honor to impose the usual sentence for second degree murder, twenty years to life, and not to impose any sentence as if he had pleaded guilty to both counts or to impose a sentence you would impose if he had pleaded guilty to life, murder in the first degree, which—

The Court: I don't know what you mean by "usual sentence". Each case is determined separately.

Mr. Rosner: Well, the usual sentence is, in a murder in the second degree plea, twenty years to life.

The Court: You mean the usual sentence is the exception to the rule.

Mr. Rosner: At any rate, your Honor, I have been very doubtful in my mind whether this defendant is medically insane.

The Court: Well,—

Mr. Rosner: But it's up to the Parole Board in the course of time to determine that. He will be there long enough for them to be able to make up their own minds. It is twenty years to life. And if you give that sentence, he can be kept there for the rest of his life, so we need not be concerned about him getting out any earlier.

The Court: That is what I am concerned about.
The defendant is sentenced to State Prison for a term of thirty years minimum; maximum, life.

WILLIAM ROVEN,
Official Stenographer.

Affidavit of Willie Richardson, in Support of Motion for Reargument.

STATE OF NEW YORK }
COUNTY OF CLINTON } ss.:

To: The Hon. Stephen W. Brennan, District Court Northern District of New York, Utica, New York.

Willie Richardson, Petitioner herein, being duly sworn, deposes and says:

That he is the Petitioner in the above entitled cause and submits this affidavit in support of his motion for reargument of the denial of his motion in the nature of habeas corpus, rendered on the 2nd day of December 1965, by Honorable Judge Brennan, District Court Judge.

Your petitioner bases his motion for reargument on the fact that in Judge Brennans memorandum denying Petitioner's motion in the nature of habeas corpus, his honor stated, paragraph 6 page 3:

> "it is impossible for this court to understand how the trial judge could have more conclusively establish that the plea of guilty was both understandingly and voluntarily.

Affidavit of Willie Richardson.

Let a true reading of the minutes of the proceeding on 22nd day of Juty 1963 show that I the Petitioner try to withdraw by involuntary plea. As stated:

> I explained to the judge that I wanted to withdraw my plea of guilty. Because I was forced to sign a confession and plea to something that I did not do. The judge told me that the court has accepted the plea and that "was it." Now I ask you your honor what harm would it have done for me to withdraw my plea, is it because the state needs the conviction to balance the scale's of justice in case a guilty man beat his case one time with a good lawyer. But yet here I'm a person that did not commit this crime doing life in prison, because I could not take my plea back, so I could go to tial. There are many words in our constitution to keep our country free, but yet the one word in the millions I seek, (justice) is never given to me. Your honor I'm not asking for the state to open the front gate of this prison, I'm asking for a hearing to prove that all I calm in my petition is true. If I have this hearing I will prove without a doubt the truth (so help me god) that I did not commit this crime, I've been beat and lieded to so much your honor, that I feel that there is no justice in New York State. If need be to prove my innocence I will gladly pay the expense to return me to the court for a hearing.

In the memorandum on paragraph 1, page 5

> "The court's attention is just called to the fact that although the transcript of the state court proceedings seems to be a photostat of the original same is not certified."

Petitioner wishes to implore the honorable justice's indulgence to read the state courts proceedings on the 22nd

day of July 1963, which will prove conclusively that petitioner try to withdraw his involuntary plea, not to say that there is foul play but if a court record is not certified there may be a few pages lost. Therefore, in the light of justice this court should grant this motion for reargument in order that the court might judge Petitioner's motion in nature of habeas corpus with respect to this information now presented. For Petitioner believes that a different outcome would have resulted.

Wherefore, your Petitioner respectfully prays that an order be made and entered herein granting a hearing on this motion for reargument in the light of this new information; and your Petitioner further prays that he be present at this hearing in order that he might present the facts to the court, and for such other further relief as to this court may seem just and proper.

Respectfully submitted,

WILLIE RICHARDSON,
WILLIE RICHARDSON—Petitioner, (pro-se),
Box B, Dannemora, New York.

(Sworn to by Willie Richardson, December 8, 1965.)

Memorandum Decision and Order, Brennan, J., dated December 10, 1965.

BRENNAN, Judge

On December 2, 1965 the application of the above named state court prisoner for a writ of habeas corpus was denied and a five page memo filed. Under date of December 9, the petitioner forwarded a document entitled "Motion for Re-argument". The document contains an affidavit in which petitioner appears to stress his innocence of the crime to which he entered a plea of guilty and that he should have been permitted to withdraw his plea of guilty in the state court. Although this application will be denied, the circumstances appear to be somewhat unusual and a brief memo for petitioner's information will be filed.

The burden of the original application was to the effect that petitioner's guilty plea was induced by the fear that a coerced confession would be used against him upon the trial. On page 8 of the original petition, there are two brief references which petitioner appears now to construe as asserting that he had sought permission to withdraw the guilty plea and that same was denied in violation of his fundamental rights. This court in the memo above cited made no reference to such a contention for the reason that there were no factual allegations to support any such contention. In fact, this court did not understand that such a contention was relied upon.

The present application will be denied for the reasons indicated.

1. Neither the original petition nor the present motion papers sufficiently allege the facts relative to any request or motion by the petitioner or in his behalf made at any time to the trial court that the guilty plea be withdrawn.

2. That the minutes of the pleading and sentence, which are a part of this record, contain no reference to any such motion or request.

3. If a motion to withdraw the guilty plea was in fact made to the state trial court at a time other than when the plea was entered or at the time of sentence, same should be disclosed and supported by affidavit of counsel or the failure to obtain such an affidavit should be explained.

4. Permission to withdraw a guilty plea invokes the court's discretion but must be made before judgment upon such plea is entered. New York Penal Law 337. The matter of the exercise of such discretion would not ordinarily raise a federal question.

5. There is no showing that petitioner has ever attempted to raise any such contention in the state courts. Although the briefs have been returned to the petitioner, it is the recollection of the undersigned that no such question was raised upon the appeal from the judgment of conviction. It follows that there is no showing of the exhaustion of state court remedies.

The petitioner's protestations of innocence of the crime to which he entered a plea of guilty are unavailing since this court has no power to pass upon such question. The state courts are under the same obligations as are the federal courts to afford the petitioner his fundamental rights. The present protest of innocence is directly contradictory to the petitioner's admission of guilt as appears in the minutes of the proceeding at which the plea was entered and set out in the original memo-decision of this court, dated December 2, 1965, which is in no way contradicted or explained even in petitioner's present application for reargument.

Order of Brennan, J., dated March 11, 1966.

For the reasons above indicated, the application for reargument or reconsideration of petitioner's prior application is hereby denied, and it is

So Ordered.

Stephen W. Brennan
Stephen W. Brennan
Senior U. S. District Judge.

Dated: December 10, 1965.

Order of Brennan, J., dated March 11, 1966.

The within application for a certificate of probable cause to appeal from the decision of this court, dated December 2, 1965, reargument denied December 10, 1965, which denied the applicant's petition for a writ of habeas corpus, be and the same is hereby refused and denied.

The submitted notice of appeal from the above decision, together with your letter of March 9 to the Clerk of this court is filed in the Clerk's office without the requirement that fees therefor be prepaid, and it is

So Ordered.

Stephen W. Brennan
Stephen W. Brennan
Senior U. S. District Judge.

Dated: March 11, 1966.

Supplemental Affidavit of Willie Richardson, in Support of Petition for Writ of Habeas Corpus.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIE RICHARDSON, being duly sworn, deposes and says:

Because I did not have the aid of legal counsel at the time I filed my petition for habeas corpus in the District Court I failed to include several facts which are relevant to my petition and appeal from the denial thereof, namely:

1. Earlier on the morning of the homicide I had been in the apartment of the deceased, drinking, along with three other persons, namely Derry Pack, Charles Cardwell and Eddie Butler. Both Pack and Butler had apartments in the same building.

2. When my sister and brother-in-law began to quarrel the three of the aforementioned persons were no longer in the apartment having left earlier.

3. In the process of preventing my relative from injuring each other I received some scratches and cuts which caused blood to get on my clothes. Since my brother-in-law and I were the same size, approximately, I removed my bloody clothes and put on some of his clothes.

4. After this I left the apartment and went to a bar on Lenox Avenue. After having a couple of drinks I was returning to my sister's apartment when two persons, whom I knew, told me that I should go around the corner to my sister's apartment.

5. When I arrived at the building I saw a crowd of people outside, and upon entering I was stopped by two detectives who began questioning me. After a few minutes of questioning they told me that I would have to go to the police station with them.

6. I was taken to the 126th Street Station House. In the same vehicle were the three persons with whom I had been drinking earlier.

7. When we arrived at the Station House the other three persons were taken into another room. I was handcuffed with my hands behind my back. When the detectives began questioning me I denied that I had been with the other three earlier in the day, because I did not wish to get them into any trouble.

8. I was then taken to another room and the detectives began questioning the other three men. When they brought me back into the interrogation room they confronted me with the fact that the other three persons had stated that I had been drinking with them earlier. I then admitted that this was true.

9. The police then released the other three men but kept me.

10. It was at this point that I requested that I be permitted to contact my attorney which request was denied.

11. The police then began to insist that I had killed my relative and repeatedly asked me to admit that I had done so. They told me that if I did not confess I would be convicted of first degree murder and electrocuted. I told them that I had not killed my relatives.

12. After questioning me for approximately fifteen minutes they then began to beat me physically. These beatings were administered to my face, stomach and other regions of the body by the use of fists of the detective.

13. After more than an hour of beating and threatening me with being electrocuted I agreed to confess.

Supplemental Affidavit of Willie Richardson.

14. The detectives wrote the confession, without consulting me. When they had finished one of the read it to me and I signed it.

15. I signed the confession in order to stop the beating. Also, without the aid of an attorney I was afraid that I might be electrocuted. I did no know what else to do.

16. After I had been indicted for first degree murder, Mr. Alfred Rosner was assigned to represent me.

17. Mr. Rosner came to see me either the last week of June or the first week of July, 1963. His entire visit lasted approximately 10 minutes. He asked me what happened, but did not take any notes. He told me that he would get paid the same amount of money for representing me regardless of the outcome. He did not mention what he intended to do to help me or prepare my case.

18. The next time that I saw Mr. Rosner was on July 22, 1963 when I was taken to court.

19. Since I had already pleaded not guilty to first degree murder I thought that my appearance in court had something to do with this.

20. My attorney did not come to see me while I was waiting in the detention room in the courthouse. The first time that I saw Mr. Rosner, since he had visited me in jail, was when I was taken to the courtroom.

21. During the three or four minutes before the proceeding began Mr. Rosner informed me, for the first time, that I should change my plea of not guilty to first degree murder to guilty of second degree murder.

22. I immediately protested. I attempted to explain to Mr. Rosner that I did not want to plead guilty to something

which I had not done. I told him that a confession was taken from me solely because I was afraid, the beatings were painful and I did not know what else to do. Mr. Rosner told me that this was not the proper time to bring up the confession.

23. Mr. Rosner explained to me that if I went to trial and the confession was used I could get the electric chair. I told him that this was the chance which I would have to take because I was not guilty.

24. Mr. Rosner then explained that I would be foolish to risk my life this way. He told me that the best thing for me to do plead to the charge of second degree murder, thereby saving my life, and then I could later explain by a writ of habeas corpus how my confession had been beaten out of me.

25. Mr. Rosner also explained to me that the District Attorney, Mr. Hogan, was an extremely tough man and that he would be in court later.

26. It was at this point that I decided to go along with the change of plea. I felt that if my own attorney told me that the confession would in all probability get me the electric chair; and also told me that I could attack the confession later without risking my life, then I had better go along.

27. I did not plead guilty because I had committed the crime.

Respectfully submitted,

Original signed by
WILLIE RICHARDSON

Original notarized on
January 15, 1968
By William E. Donahue

Affidavit of Alfred I. Rosner.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALFRED I. ROSNER, being duly sworn, deposes:

I am an attorney and counselor at-law, duly admitted, on January 9, 1928, to practice in all the courts of the State of New York, with offices at 280 Broadway, N. Y. 7, N. Y.

That heretofore on April 11, 1963, the above-named defendant Willie Richardson was indicted on two counts of Murder in the first degree. Upon arraignment, on April 16, 1963, under said indictment, the defendant appeared without counsel, and when he was asked by the Court whether he desired the aid of counsel he replied that he did. He thereupon signed an affidavit in which he stated that he was wholly destitute of means with which to employ counsel to defend him upon the trial of the said indictment or to pay such incidental expenses as might be incurred in the conduct of his defense, and requested the court to assign counsel to him. Thereupon, on April 19, 1963, Honorable Mitchell D. Schweitzer, one of the Justices then presiding in Part 30 thereof, duly made and entered an order assigning your deponent, Alfred I. Rosner and William P. McCooe of 5 Beekman Street, N. Y. 7, N. Y., as counsel for the defendant upon the trial of the said indictment. A copy of said order is annexed hereto as "Exhibit A" and made part hereof.

That pursuant to said assignment your deponent filed a Notice of Appearance on behalf of himself and co-counsel; and filed a notice with the Warden of Tombs Prison on April 19, 1963. He learned that on April 11, 1963, the defendant had been committed for observation to Bellevue Hospital by Judge Michael J. Sherwin of the Criminal Court.

Counsel read the Indictment and then located the Felony Court complaint and the defendant's criminal record and

made copies of the same; and thereafter discussed same with co-counsel.

On April 24, 1963, a copy of the Indictment was obtained and the pleading adjourned a number of times, each time at the request of the Bellevue psychiatrists. On each of the adjourned dates both counsel appeared in court on behalf of defendant.

On June 20, 1963, deponent received a copy of the Medical Report in which defendant was found not insane. Counsel discussed this report with each other and sought outside advice pertaining thereto. They also studied the law dealing with the subject of Insanity. In addition counsel studied the law pertinent to the particular issues to be litigated, including the application of the law dealing with a two stage trial in cases of murder in the first degree.

On June 27, 1963, the defendant on his arraignment pleaded Not Guilty with a specification of Insanity, and requested time until August 2, 1963 to make motions.

Counsel had conferences with defendant and with each other relative to preparation for trial as well as relative to the advisability of obtaining and taking a compromise plea.

On July 22, 1963, the case appeared on the trial calendar in Part 34, before Justice George Postel. The case was discussed with the Assistant District Attorney, Mr. McKeever, who offered to allow defendant to plead guilty to the indictment and receive a life sentence. Counsel declined this offer. Thereafter with the aid of the Court, the defendant, on recommendation of the District Attorney (through Mr. McKeever) was permitted to plead guilty to murder in the second degree under the first count of the indictment, such plea to cover all counts of the indictment. Sentence was set for September 27, 1963, then changed to September 25, 1963, then to October 9, 1963. Counsel also interviewed defendant after the entry of the plea.

Thereafter on September 25, 1963, the defendant was sentenced by Justice George Postel for a term of 30 years to life in State Prison.

WHEREFORE, your deponent respectfully requests that the Court grant the annexed order allowing deponent and his co-counsel reasonable compensation for their services rendered herein as counsel on behalf of the defendant Willie Richardson in this action.

No previous application had been made for an allowance for services rendered herein.

ALFRED I. ROSNER.

(Sworn to by Alfred I. Rosner on September 9, 1963.)

Affidavit of William P. McCooe.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM P. McCOOE, being duly sworn deposes:

That he is an attorney and counselor at-law of the State of New York, and has his office at 5 Beekman St., N. Y. 38.

That he has read the annexed affidavit of Alfred I. Rosner and the same is true to his own knowledge and the services set forth therein were actually rendered on behalf of the defendant, Willie Richardson, by your deponent and Alfred I. Rosner.

WHEREFORE, your deponent respectfully prays that the annexed Order of Compensation be granted.

WILLIAM P. McCOOE.

(Sworn to by William P. McCooe on October 9, 1963.)

United States Court of Appeals' Order of Reversal.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and sixty-nine.

Present:

HON. LEONARD P. MOORE,
HON. PETER WOODBURY,
HON. J. JOSEPH SMITH,
Circuit Judges.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for a hearing to develop all the facts with directions that the hearing be transferred to the United States District Court for the Southern District of New York and shall be held with all reasonable expedition before one of the Judges of said District Court, and for

further proceedings in accordance with the opinion of this Court.

It is further ordered, adjudged and decreed that John T. Baker, Esquire, 52 Vanderbilt Avenue, New York City, New York 10017 be and he hereby is assigned to represent the appellant on the hearing.

/s/ A. Daniel Fusaro,
Clerk.

Circuit Court Opinions—Ross and Dash.

UNITED STATES COURT OF APPEALS

For the Second Circuit

September Term, 1967.

(Submitted to the court
in banc October 17, 1968 Decided February 26, 1969.)

No. 492—Docket No. 32140

Before:

Lumbard, Chief Judge,
Waterman, Moore, Friendly, Smith, Kaufman
Hays, Anderson and Feinberg, *Circuit Judges.*

United States ex rel. Ross v. *McMann* was argued May 9, 1968 before Lumbard, *Chief Judge,* and Smith and Anderson, *Circuit Judges.*

United States ex rel. Dash v. *Follette* was argued on June 21, 1968 before Moore and Friendly, *Circuit Judges*, and Bryan, *District Judge*.

Since similar issues of importance in determining state prisoner habeas corpus applications were involved in these cases, and in No. 32264, *United States ex rel. Oscar Leon Rosen* v. *Follette*, the court on October 17, 1968 ordered the three cases considered *in banc*.

Appeal in *United States ex rel. Ross* v. *McMann* from judgment of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*, dismissing without hearing application of state prisoner for writ of habeas corpus. Reversed and remanded.

THOMAS D. BARR, New York, N. Y. (Duane W. Krohnke, New York, N. Y., on the brief), *for relator-appellant*.

JOEL LEWITTES, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee*.

Appeal in *United States ex rel. Dash* v. *Follette* from order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, denying

without hearing petition of state prisoner for writ of habeas corpus. Reversed and remanded.

GRETCHEN WHITE OBERMAN, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief), *for petitioner-appellant.*

MORTIMER SATTLER, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge* (with whom Judges Waterman, Kaufman, Hays, Anderson and Feinberg concur):

United States ex rel. Ross v. *McMann* is an appeal from a dismissal without hearing of an application by a state prisoner for writ of habeas corpus in the District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*. Relator, confined in a New York State prison for a term of 45 years to life on conviction upon plea of guilty to murder in the second degree, petitioned the Supreme Court of the State of New York for Kings County for a writ of error *coram nobis* on the ground that his guilty plea was induced by coerced confessions. The writ was denied without a hearing, the decision affirmed without opinion by the Appellate Division, *People* v. *Ross,* 272 N.Y.S. 2d 969 (2d Dept. 1966) and leave to appeal denied by the New York Court of Appeals.

The District Court entertained the application for writ of habeas corpus, and dismissed the petition without a hearing on the ground that "a voluntary guilty plea en-

tered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him," relying on *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966). In his complaint and supplemental affidavit Ross alleges that he pleaded guilty because his attorney had refused to attempt to suppress a confession which had been illegally obtained from him and had warned him that if he risked a trial, the confession and other evidence against him would surely lead to his conviction for first degree murder and sentence to the electric chair.[1] We hold that

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[1] Judge Bruchhausen in his opinion recited some of Ross' allegations, including the following:

"In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

"In October, 1954, he was arraigned on an indictment, charghim with the commission of first degree murder;

"Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the confession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

"In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

"March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life";

Among other allegations by Ross was the following:

"13. Sometime later he visited me again; I would say it was five or six weeks afterward, but I cannot be certain with greater specificity. I asked him then 'to get my confession back.' I recall those to have been my exact words. I meant that I wanted to repudiate the confession and have it suppressed. I

(*footnote continued on following page*)

these allegations raise a sufficient question as to the voluntariness of the plea of guilty to require a hearing before the issue is determined.

On the record before us, it appears that Ross has sufficiently raised his present claims in the state courts to satisfy the requirement of exhaustion of state remedies. On oral argument, however, it was represented that a second petition by Ross for relief by writ of error *coram nobis* has been brought to and is pending in the state courts.

(*footnote continued from previous page*)

spoke in the belief that it could be done in some way. He told me that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make 'a jury of twelve cousins' convict me and send me to the electric chair. He told me that he would 'get the first possible break' for me from the District Attorney, but that I 'would be dead by the Fourth of July' if I risked a trial.

"14. When I was brought to Court in February of 1955, Mr. Strelzin came in to see me while I was in the detention cell. I asked him again about repudiating and suppressing my confession; this seemed to exasperate him because he spoke sharply about having gone all through that before and that I had better listen to him because *he* was my lawyer and not those convicts in Raymond Street who would all be in Sing Sing in six months with all the law they knew. I told him I had not asked him on the basis of anything anyone had told me. He seemed to grow calmer at that. He told me he had spoken to the District Attorney, who was willing to allow me to plead to second degree murder, and I would get twenty years to life; he said it was an 'or else' offer, that I knew the evidence the District Attorney could present against me. He said that things were no better than before and, if anything, were much worse; the District Attorney had the confession, the gun, and Jenkins, who could be expected to tell any story to help himself. If I insisted on going to trial, well, he was my lawyer and would do what he could, though that couldn't amount to very much because 'there isn't a pair in the world to beat four aces.' Twenty to life was a long time, he wasn't going to argue that it wasn't; but it had to be better than the electric chair."

If this is determined by the District Court to be the fact, that court may defer hearing in this matter pending final determination of the action in the state courts. And, if hearing is had on the issue in the state courts, the District Court may find further hearing before it unnecessary to its determination of the merits. We reverse and remand to the District Court for further proceedings not inconsistent with this opinion.

This case raises the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession.

It is clear, first of all, that a plea of guilty, even where the defendant is represented by counsel, is not an absolute bar to collateral attack upon a conviction. *Waley* v. *Johnston, Warden*, 316 U. S. 101 (1942). Cf. *Pennsylvania ex rel. Herman* v. *Claudy, Warden*, 350 U. S. 116 (1956). (In *Herman*, petitioner did not have benefit of counsel.) See also *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962): "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack." To paraphrase *Harrison* v. *United States*, 392 U. S. 219, 223 (1968), "The question is not *whether* the petitioner made a knowing decision to [plead] but *why*." Nor is the mere existence of a coerced confession enough to invalidate a later guilty plea by a defendant represented by counsel.

The question to be answered in any case involving a collateral attack on a conviction based upon a plea of guilty

is usually expressed in terms of whether or not the plea was a "voluntary" act. [An "involuntary" plea of guilty is inconsistent with due process of law, see *Waley* v. *Johnston, supra,* 316 U. S. at 104, and thus invalid whether made in federal or state court.] And *Townsend* v. *Sain, supra,* 372 U. S. at 312-13, requires that where the petitioner in such a case has not received a "full and fair evidentiary hearing" in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court.

The question of when to hold a hearing has apparently been complicated in this Circuit, however, by confusion between the doctrine that an involuntary guilty plea may be collaterally attacked and the well-established doctrine that *if* the plea *is* voluntary, it is an absolute waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant.

Judge Weinfeld said in *United States* v. *Colson,* 230 F. Supp. 953, 955 (S.D.N.Y. 1964), "The determination of the ultimate question of whether the defendant, at the time he pled guilty, had the free will essential to a reasoned choice, rests upon probabilities and, of course, cannot be resolved with mathematical certainty. It involves an evaluation of psychological and other factors that may reasonably be calculated to influence the human mind . . . [I]t is necessary to consider the plea of guilty against the totality of events and cirumstances which preceded its entry." The determination is difficult, but it is not necessarily rendered more difficult simply because a coerced confession or an illegal search and seizure is one of the factors which may be taken into account.

In the case at bar, the court, relying on *Glenn,* found it unnecessary to make such a determination. This, we think, resulted from a too expansive reading of *Glenn.* The opin-

ion in *Glenn* may be read either of two ways: (1) the allegation of a coerced confession, *without more,* is not sufficient to raise the issue of the voluntariness of a guilty plea; or (2) an unconstitutionally coerced confession is never relevant to the issue of the voluntariness of a guilty plea. The first, more narrow reading, seems to us to state the proper rule. But the second reading (the much more likely meaning of the opinion despite the use of the word "voluntary," in view of the allegation that the plea was *coerced by the existence of* an involuntary confession) confuses the doctrine that an involuntary guilty plea may be collaterally attacked with the doctrine that if it is voluntary, a guilty plea waives prior defects in the proceedings against the defendant.

The court relied on two cases in *Glenn: United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2 Cir. 1965), cert. denied 382 U. S. 869, and *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2 Cir. 1965). Neither of those cases holds that the waiver rule should operate to make an invasion of the defendant's Constitutional rights irrelevant to the issue of the voluntariness of the guilty plea.

In *Swanson,* this court affirmed the denial of relief in a habeas corpus proceeding challenging the constitutionality of the statute under which petitioner had been convicted, where a hearing had been held below. There is language in the court's opinion refusing to rest affirmance on the ground that a plea of guilty should bar collateral attack. In discussion of that issue, 344 F. 2d at 261-62, it was said:

> The cases most nearly in point but by no means exactly so concern guilty pleas proper in other respects, such as right to counsel, but lodged after the police had obtained evidence in violation of constitutional rights; a number of circuits have said such

> guilty pleas are not subject to attack [citing cases], even when induced by that evidence [citing cases].[2]

In *Boucher*, the other case cited in *Glenn*, the petitioner sought to attack his conviction based upon a guilty plea. After stating the waiver rule, this court said:

> To circumvent the effect of the guilty plea as a waiver, the petitioner asserts that his plea was induced by inadequate representation by counsel and by the fear that unconstitutionally obtained evidence would be used at his trial.

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[2] The cases cited in the quoted discussion in *Swanson* are the following: *Gonzalez* v. *United States*, 210 F. 2d 825 (1 Cir. 1954) (denial of motion to vacate judgment affirmed where conviction based on guilty plea and motion based *solely* on the ground that evidence had been unconstitutionally seized); *Hall* v. *United States*, 259 F. 2d 430 (8 Cir. 1958), cert. denied 359 U. S. 947 (1959) (denial of motion to vacate sentence affirmed where the allegation was of confession after "four hours of intensive interrogation without legal advice or counsel," but there was a *finding in the District Court* that there was a "free and voluntary" plea of guilty); *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960) (denial of Sec. 2255 motion to vacate sentence affirmed, where the motion was based on the ground that police used appellant's co-defendant's confession to induce him to confess and then to plead guilty, but *upon a full hearing in the District Court it was found*, on ample evidence, that the guilty plea was "competently, voluntarily, and intelligently entered"—the statement, picked up out of context in the West's headnote, that collateral attack on the plea of guilty would not lie, reads in full, 278 F. 2d at 250: "Finally, at the hearing we ordered, appellant frankly admitted his guilt. On this record collateral attack would not lie."); and *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7 Cir. 1964) (dismissal of petition for habeas corpus affirmed, where petitioner contended that his plea of guilty did not waive prior police misconduct—alleged illegal search—which "induced" his plea, but the *District Court found after a hearing* that petitioner was not entitled to a writ, and the Court of Appeals noted three times that there was no evidence presented at the hearing that the plea was not voluntary).

341 F. 2d at 981. The opinion then goes on to explain how the petitioner's representation by counsel had been entirely competent, there were no circumstances indicating an illegal search and seizure, and "There is not a shred of evidence that anyone induced him to plead guilty and the court concluded 'it was made freely, voluntarily and intelligently.' " A hearing was held in *Boucher*.

The meaning of the rule was also left somewhat uncertain by a *per curiam* opinion in *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2 Cir. 1965), cert. denied 384 U. S. 957 (1966). There, a denial without a hearing of an application for habeas corpus was affirmed, where appellant claimed, *inter alia*, that he pleaded guilty because a coerced confession had been obtained from him. The court said: "An examination of the facts and circumstances surrounding the taking of the plea convinces us that the plea was made voluntarily, the colloquy between the sentencing judge and appellant being decisive." The court then cited the waiver rule, as stated in *Glenn*, along with a "see also" citation to *Swanson* and *Boucher*. Judge Waterman concurred on the gound of failure to exhaust state remedies, and stated that he thought the court had made an ambiguous use of the word "voluntary," since although the petitioner had not demonstrated that a hearing would prove his allegation that his guilty plea was "required by an alleged prior forced confession," "Nevertheless, I can conceive of situations in which a plea of guilty upon the advice of counsel would have been caused by circumstances entitling the defendant to challenge his own act on the ground it was a compelled act." 352 F. 2d at 419.

We have in other cases also used language inconsistent with the District Court's reading of *Glenn* here. In *United States ex rel. Siebold* v. *Reincke*, 362 F. 2d 592 (2 Cir. 1966), a denial of a petition for a writ of habeas corpus was affirmed *per curiam* on the ground that "the hearing

before the District Court indicated that petitioner's guilty plea was not the result of unconstitutionally obtained evidence." 362 F. 2d at 593. In the course of the opinion, it was noted that "A conviction will not be sustained if it rests upon a plea of guilty which is the result of coercion, nor, perhaps, if the plea of guilty resulted from other violations of constitutional rights," citing *Vaughn, supra,* and *United States ex rel. McGrath* v. *La Vallee,* 319 F. 2d 308, 311 (2 Cir. 1963). Neither *Glenn* nor *Martin* was mentioned. In *McGrath,* the court split three ways (for no hearing, a hearing, and outright granting of a writ of habeas corpus) in a case where petitioner contended that his guilty plea had been involuntary—the claim of coercion was based upon what the trial judge said to the petitioner just before the guilty plea was entered.

The rule should be stated as follows: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea.

On the other hand, the fact that the petitioner was represented by counsel and acted after consultation with counsel is also to be given substantial weight in determining the issue of voluntariness of plea.

From and after *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), the state and federal courts have stressed the value and necessity of providing an accused with counsel because, except in the very few cases of inadequate representation,

the professional skill and judgment of the attorney, exercised on his client's behalf, affords the accused protection of his rights. The role of the attorney in advising a plea of guilty should not, therefore, be ignored. Even where there is evidence that a confession has been coerced, there may be factors which would justify counsel for the accused, once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied, to advise a plea of guilty. Therefore, a mere conclusory allegation by a prisoner without more, that the existence of a coerced confession induced his guilty plea, in the absence of any particularized allegations as to how that confession rendered his plea involuntary, should not ordinarily be considered sufficient to predicate an order for a hearing.[3] See *United States ex rel. White* v. *Fay*, 349 F. 2d 413 (2 Cir. 1965); *United States ex rel. Homchak* v. *New York*, 323 F. 2d 449 (2 Cir. 1963), cert. denied 376 U. S. 919 (1964).

The rule we have set out is apparently consistent with the views of at least the Third, Fifth, Sixth, Seventh, and Ninth Circuits. See *United States ex rel. Collins* v. *Maroney*, 382 F. 2d 547 (3 Cir. 1967) (*per curiam*); *Smith* v. *Wainwright*, 373 F. 2d 506 (5 Cir. 1967); cf. *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5 Cir. 1967), a stronger case for the petitioner; *Reed* v. *Henderson*, 385 F. 2d 995 (6 Cir. 1967), dictum: "Appellant apparently attempts to circumvent the waiver attending the plea of guilty by claim-

[3] To enable the district court to decide whether or not a hearing should be ordered, additional supporting material such as the affidavit of the attorney who represented the petitioner when he entered the guilty plea, or exhibits, or affidavits of persons having knowledge of the claimed facts, should be appended, with the petitioner's own affidavit, to the original petition filed with the district court. In this case, however, we are satisfied from the petitioner's affidavit alone that he is entitled to the requested hearing.

ing that the plea was involuntary in that it was the product of, or induced by, certain coerced admissions which had been obtained from him by the police. That this may be a ground for habeas corpus relief appears to be well settled," 385 F. 2d at 996; *Shelton* v. *United States,* 292 F. 2d 346 (7 Cir. 1961), cert. denied 369 U. S. 877 (1962); *Doran* v. *Wilson,* 369 F. 2d 505 (9 Cir. 1966).

To sum up: *Glenn* says, in effect, that a "voluntary" plea of guilty wipes out all prior invasions of the defendant's constitutional rights. Whether that is correct or not depends on the meaning of "voluntary"; it must be recognized that a prior invasion of the defendant's rights, even if not sufficient after the taking of the plea to overturn the conviction, may still be entirely relevant to the issue of the plea's voluntariness. The problem is that *Glenn,* together with *Martin,* is sometimes being read by the District Courts to say that a coerced confession or other violation of a defendant's rights is *never* relevant to the issue of voluntariness, and in these cases the District Courts are relying upon representation by counsel and proper questioning by the judge at the plea taking to establish voluntariness without more, even where the allegations of the habeas corpus petition raise questions which cannot be answered by reference to the transcript alone.

This court has recently discussed the reasons why the voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, *United States ex rel. Rogers* v. *Warden of Attica State Prison, supra,* 381 F. 2d 209 at 213 (2 Cir. 1967):

> There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state pro-

cedures; therefore, principles of comity and the interests of orderly federal-state relations require that he should not be allowed to present these claims to the federal courts.

A distinguishing feature of the present case, however, is that the only available state procedure by which he could contest the validity of the confession was the one declared retroactively unconstitutional in *Jackson* v. *Denno*, 378 U. S. 368 (1964). This is even more damaging to an accused than the lack of a right to appeal the intermediate order denying the Fourth Amendment motion to suppress in *Rogers, supra, p.* 214.

Faced with that hazard as his only alternative recourse, made particularly perilous in the context of the first degree murder charge with a possible death penalty, the decision of the accused, on advice of counsel, to plead guilty to second degree murder might well be held to have been involuntary. The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest.

The judgment is reversed and the case remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[4] within 60 days from the

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[4] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary or that the plea was not substantially motivated by the confession.

date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

Turning to *United States ex rel. Dash* v. *Follette,* Foster Dash was sentenced on August 3, 1959, in the New York state courts on plea of guilty to a charge of robbery second degree, to imprisonment for a term of 8 to 12 years as a second felony offender. Dash sought release by writ of error *coram nobis* on the ground that a false confession was obtained from him after indictment in violation of his right to counsel, and that his plea of guilty was induced by advice of counsel that the confession would negate any chance of acquittal and by a threat by the trial judge that he would receive the maximum possible sentence if he went to trial and was found guilty. The writs were denied without hearing, and the orders affirmed by the Appellate Division (21 A. D. 978) and by the Court of Appeals (16 N. Y. 2d 493, 260 N.Y.S. 2d 437 (1965)), two justices dissenting.

Petitioner then applied for writ of habeas corpus, alleging similar grounds, in the United States District Court for the Southern District of New York. The Court, John M. Cannella, *J.*, denied the application, relying principally on *United States ex rel. Glenn* v. *McMann, supra, United States ex rel. Swanson* v. *Reincke, supra,* and *United States ex rel. Boucher* v. *Reincke, supra,*[5] and petitioner appeals. We reverse and remand with instructions.

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[5] The District Court summarized the record before it as follows:

"Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession, (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

"In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of

(*footnote continued on following page*)

In this case, as in *United States ex rel. Ross* v. *McMann*, decided herewith, a state prisoner's application for writ of habeas corpus was denied without hearing, the court relying largely on *United States ex rel. Glenn* v. *McMann*, since the petitioner, represented by counsel, had pleaded guilty in the state court. Here Dash alleges coercion of his confession. (Conviction of two of his co-defendants who went to trial was set aside because it was held that their confessions were coerced. *People* v. *Waterman*, 12 A. D. 2d 84, aff'd 9 N. Y. 2d 561 (1961).) He also alleges coercion of his plea, relying partly on the existence and threatened use of his coerced confession, and partly on an alleged threat by the judge to impose the maximum possible sentence if he were found guilty after a trial. The latter ground was dismissed from consideration by the judge because the report of the state court proceeding, *People* v. *Dash*, 16 N. Y. 2d 493 (1965), indicated that the prosecutor had filed an affidavit categorically denying that the trial judge ever threatened the defendant.

In this case, as in *Ross* v. *McMann*, the claim is made that the existence of a coerced confession, in a case determined prior to *Jackson* v. *Denno*, *supra*, so tainted the

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(*footnote continued from previous page*)

the proceedings against the defendant. *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965); *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

"With respect to the second contention it appears that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See, *People* v. *Dash*, 16 N. Y. 2d 493 (1965).

"Further the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him."

state court proceedings that the plea was not voluntary. For the reasons set forth in *Ross* v. *McMann,* we think the allegations here sufficient to call for a hearing on the voluntariness of the plea unless a full hearing and determination of the issue is provided in the courts of the state. As we held in *Ross,* "The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing. If it was motivated by the claimed threat of the judge, or the existence and threatened use of a coerced confession, it may be found not to have been voluntary. On the other hand, if it is found that there was no such threat by the judge, and if the plea was freely made on advice of counsel because of the weight of the state's case aside from the confession, with apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence, the court may find the plea voluntary, and the conviction unassailable.

Reversed and remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[6] within 60 days from the date of issuance of the

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[6] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary and there was no threat by the judge, or that the plea was not substantially motivated by the confession or by the alleged threat of the judge.

mandate herein, or such further time as the District Court may for good cause allow.

WATERMAN, *Circuit Judge,* concurring:

I concur in the opinion for the majority of the *in banc* Court written by Judge Smith.

I accept Judge Kaufman's approach in his concurring opinion, and I concur in that opinion, also.

SRW

KAUFMAN, *Circuit Judge,* concurring (with whom Judges Waterman, Anderson and Feinberg concur):

I am in full accord with my brother Smith's opinion.

Because we are not writing on a clean slate, and the majority accordingly came to the only conclusion open to it in *Ross* and *Dash,* I feel impelled to respond to the objections raised by my dissenting brothers.

Notwithstanding the caustic tones in which one of them has retorted I believe it my responsibility to set forth my views lest one believe that only the dissenters seek to protect us "against those who have made it impossible to live today in society" *Harrison* v. *United States,* 392 U. S. 219, 235 (1968) and that the majority has become an ally of criminals, devoid of all interest in the community's safety and living insensitively in its ivory tower.

First, I should hardly have thought it necessary, but for my brothers' dissent, even to mention the judicial precept that the ultimate guilt or innocence of the defendants has no bearing on the issues before us. Under our system of criminal justice two indispensable conditions must be met to render valid a determination of guilt: not only must the accused actually be guilty of the crime for which he was convicted, but the procedure leading to his conviction

must comport with the requirements of due process. Thus, even if we were to agree with my dissenting brother's declamation that "Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are," I submit that such an observation is gratuitous and irrelevant to the issue before us: whether the state procedures leading to the entry of the pleas of guilty in question were fundamentally fair in a constitutional sense.

Second, I am impelled to dissipate the impression that our decision is somehow a novel departure from established constitutional tenets. On the contrary our decisions here are absolutely required by the principles the Supreme Court has long enunciated. Thus, in *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962), the Court cautioned:

> ". . . A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime courts should be careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." [quoting *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927)].

This instruction of the Court cannot be ignored merely because the particular facts of that case are somewhat different from those in the cases before us, or because nonessential distinctions might be spun. If we could turn our backs on a pronouncement as clear as that quoted merely because the facts in the case under consideration may not be on all fours, no precept or *ratio decidendi* of the Supreme Court would have any force. It does not require

too much imagination to recognize that the principles and the problems we are dealing with are the same. *Machibroda* mandated that, because of the extreme gravity of a guilty plea, in *all* cases where a conviction based upon such a plea is attacked we must *carefully* and conscientiously consider the surrounding circumstances to determine whether it was properly and voluntarily made. And since *Machibroda* itself involved a collateral attack on a conviction based upon a guilty plea we cannot, as one of my dissenting brothers suggests, ignore the applicability of this mandate to other cases where post conviction attacks are made on the propriety of the guilty pleas merely because they come "long after the defendant has gotten the benefit of his bargain."

Moreover, in *Herman* v. *Claudy,* 350 U. S. 116, 118 (1956), the Court further instructed:

> ". . . [A] conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." [Italics added.]

While the petitioner in *Herman* alleged a more aggravated deprivation of rights than appears in the cases before us, such a distinction is not compelling. Although the court was dealing with a greater degree of contamination, I do not read *Herman* as preaching a doctrine that the taint must reach only the gradations found there before one may claim the pleas were induced by fundamentally unfair procedures. If the Supreme Court had intended to limit the holding to the precise facts in that case it would have done so explicitly, or at least by intimation, a course it has followed in so many other cases where it desired to achieve such a limited goal. When instead the court enunciated a clear, unqualified, and unequivocal principle of general ap-

plicability, we, as an inferior court, are duty bound to regard it as governing in analogous cases presenting the same question of law. My brother Friendly made the point when he said in another context, "Our duty as an inferior federal court is to apply, as best we can, the standards the Supreme Court has decreed. . . ." *United States* v. *Motion Picture Film Entitled "I Am Curious-Yellow,"* Dkt. No. 32448 (2d Cir. decided November 26, 1968) (concurring opinion) at 3682 (holding the film not obscene), whether or not we would make the same pronouncements if free to do so.

Judges must be careful lest their personal predilections lead them to ignore the constitutional requirements set forth by the Supreme Court, by indulging in sophistic games of distinction-making because they do not approve of the Court's Constitutional determinations. In this instance we are buttressed in our interpretation of *Herman,* which one of my dissenting brothers pansophically dismisses as "a dismal failure," by the knowledge that many other federal circuit courts have also "failed" and read *Herman* precisely as we have. E.g., *Reed* v. *Henderson,* 385 F. 2d 995, 996 (6th Cir. 1967); *Smiley* v. *Wilson,* 378 F. 2d 144, 148 (9th Cir. 1967); *Bell* v. *Alabama,* 367 F. 2d 243, 246 (5th Cir. 1966), cert. denied 386 U. S. 916; *Jones* v. *Cunningham,* 297 F. 2d 851, 855 (4th Cir. 1962), cert. denied 375 U. S. 832 (1963). Indeed, in *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963), apparently overlooked, my able brother Lumbard endorsed *Herman* when, citing that case he remarked "A plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." 318 F. 2d at 499.

Not only is the result of the majority following the only course left open to a lower court by the Supreme Court, but it is sound because, as the law must, it comports with

the realities of the situation. Consider for a moment the paradigm, where the prosecution has no other evidence against the defendant but the confession which it illegally obtained from him, and where, as in *Ross* and *Dash*, the defendant has no adequate means of challenging the confession prior to his trial. Under these circumstances it would be nothing less than fantasy for us to say that the existence of the confession could not have substantially motivated the plea. And if, in the more common case, the determination is more difficult because the prosecution also has other evidence against the defendant, I do not believe that such difficulty releases us from the obligation to consider the possibility that the existence of the confession had a substantial motivational effect. In reality we can never, as my brothers urge, escape deciding these cases, as distasteful as it might be. By refusing to consider them individually we merely decide they should all come out the same way—an approach hardly commendable or likely to reach a just result in those cases worthy of consideration.

Moreover, once we face up to the realities of the situation, the fundamental fallacy of my dissenting brothers' argument—that no coercion or untoward pressure of the *state* caused these pleas—becomes apparent. The state allegedly illegally obtained the confession from the defendant and the state denied him any adequate means of suppressing it prior to trial. How the state can then be transformed into a disassociated neutral observer when defendant pleads guilty because of that confession is too metaphysical for my comprehension. Once it has thus unfairly placed the defendant in an inherently coercive situation, I do not understand our solicitude for the state's claim that all pleas of guilty must under any and all circumstances be final, absolute and beyond judicial instruction.

Moreover, I must emphasize that, as the majority indicates in *Ross* we are by no means the first or only circuit to reach this result. Particularly in the Fourth Circuit, e.g., *White* v. *Papersack,* 352 F. 2d 470, 472 (1965); *Jones* v. *Cunningham, supra;* the Fifth Circuit, e.g., *Bell* v. *Alabama, supra;* and the Ninth Circuit, e.g., *Smiley* v. *Wilson, supra; Doran* v. *Wilson,* 369 F. 2d 505 (1966), the rule my dissenting brothers view as so novel and indeed unprecedented—that a guilty plea induced by the existence of an illegally obtained confession cannot stand —is well established law. And, we long ago embarked on the trying course of reviewing state convictions because the Supreme Court so decreed. See e.g., *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (1955), cert. denied, 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7 (1958), cert. denied, 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee,* 270 F. 2d 513 (1959), cert. denied, 361 U. S. 950 (1960); where we found confessions coerced, despite jury findings to the contrary which had been accepted by New York Courts.

Finally, it would, in my view, be the rankest unfairness, and indeed a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson* v. *Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them. Nor do I believe that we are free to refuse to consider a valid claim for a hearing because the separation of meritorious claims from those of no merit is difficult. This "difficult" task is faced daily by judges; to avoid it by throwing out all petitions—even meritorious ones—because the chore is onerous would be an abdication of our judicial duty. The Supreme Court clearly stated in *Townsend* v. *Sain,* 372 U. S. 293 (1963) that where a state prisoner alleges facts which, if proved, would entitle him

to relief, he must be afforded a federal hearing on his habeas petition, where he has not received an adequate state hearing on the issue. And the Court has also held, repeatedly and emphatically, that where petitioner's allegations present an issue of fact not refuted by the files and records, we cannot deny him a hearing merely because his allegations are improbable. *Machibroda* v. *United States,* 368 U. S. 487, 494 (1962); *Waley* v. *Johnson,* 316 U. S. 102, 104 (1942); *Walker* v. *Johnson,* 312 U. S. 275, 285 (1941).

Although our decisions may encourage some prisoners to file petitions wholly devoid of merit, the short answer to this is that most advances in the law have been subject to abuse. But, if this were to deter courts from doing what should be done, the law would remain stagnant. Nor, do I share the belief that the mere filing of such petitions will overwhelm our experienced district judges. The trained judges' eyes can quickly sift out those not deserving of a hearing. It was not much of a task for the district judge and this Court to do just that with Rosen's petition. Indeed, the statistics of the Administrative Office of the United States Courts reflect that hearings in state habeas corpus cases between 1966 and 1968 have been granted in only about 8% of the approximately 5000 to 6000 applications filed each year during that period.[1] Moreover, we must not overlook the fact that pleas in the post-*Jackson* v. *Denno* era will not be affected by our ruling.

In any event, we have already recognized:

> "There is an understandable tendency to try to avoid hearings . . . where it appears that there is little merit in the petition, and that hearing might well be of no avail to the petitioner. With the crowded dockets and

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[1] Administrative Office of the United States Courts, Annual Report of the Director, 1966 and 1967, Tables C-3 and C-4. The information for 1968 is not yet published.

> delay caused by a heavy judicial workload, a diligent judge, out of concern for our goal of speedy justice, may well overlook the fact that a particular application alleges sufficient particulars to require a hearing. Our concern for efficiency must not outweigh our concern for individual rights. We cannot refuse a hearing because hearings generally show that there is no real basis for relief, or even because it is improbable that a prisoner can prove his claims." *United States* v. *Tribote,* 297 F. 2d 598, 603-04 (2d Cir. 1961).

A court of law whose function it is to guard against injustice cannot refuse access to those properly invoking its process merely because it must also deal with others who cry wolf too often.

Accordingly, I believe that when, as in ***Ross*** and ***Dash,*** a petitioner alleges facts sufficient to support his claim that his guilty plea was substantially induced by the existence of a confession illegally obtained from him which he had no adequate means of challenging, and his allegations are not controverted by the record, we cannot avoid our duty—time consuming as it may be—to grant him a hearing. Of course, we are not suggesting for a moment that the writ should be sustained after such hearing. The petitioner must carry the burden of establishing that the coerced confession substantially motivated him in pleading guilty. Thus, we are a long way from the house of horrors which the dissenting opinions suggest would confront us if a reprosecution were ordered. We do no more today than to determine that *all* petitions cannot be thrown out without regard to their merits merely because "no certain answers" can be given with the precision of a mathematical equation —a condition which the dissenters would seem to require. If this test had validity no court would ever inquire into the voluntariness of a plea of guilty or the voluntariness of a confession, for voluntariness is a purely subjective

action and never can "certain answers" be given by the fact finder. One of my dissenting brothers recognizes that "Absent some credible and detached *proof* to the contrary, we must assume that defendant's interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing [they] were guilty . . ." (Emphasis added.) Ross and Dash merely ask for the chance to give this *proof* at a hearing, which I cannot find any sound basis for denying in light of the allegations in their petitions.

ANDERSON, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

FEINBERG, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

LUMBARD, *Chief Judge,* dissenting (with whom Judges Moore and Friendly concur):

I would affirm the denials by the district courts of the petitions of these two state prisoners, Wilbert Ross and Foster Dash, for writs of habeas corpus.

In my opinion, these cases are governed by *United States ex rel. Glenn* v. *McMann,* 344 F. 2d 1018 (2d Cir. 1965), which held that "a voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." The conclusion that the guilty pleas in both of these cases were entered knowingly and without coercion is, to my mind, inescapable.

In each of these cases the state prisoner was represented by counsel long prior to the plea of guilty and there was

adequate time for full consideration of the case by the defendant and his counsel. Furthermore, it is apparent that the pleas were motivated by knowledge that the state had substantial evidence in addition to any confession it may have had from the defendants. In sum, it is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the judge would impose would be less than if they were to stand trial and be convicted.

Nor do I think that *Jackson* v. *Denno,* 378 U. S. 368 (1964), should be applied to require a hearing in plea of guilty cases to determine whether the existence of the allegedly involuntary confession "coerced" the plea of guilty or whether the plea was taken for other reasons. I would confine *Jackson* v. *Denno* to cases where New York used the confession at trial, over objection that it was coerced, at a time when New York failed to provide a means of testing such objection prior to trial; it should not be given retroactive effect to cases where defendants pleaded guilty.

To say that a hearing might show these pleas to have been "involuntary" because they were induced by the fact that New York law, at the time of the pleas, provided that the voluntariness of confessions which the petitioners claim they made would be tested by the jury, is to indulge in profitless speculation and to embark upon an inquiry where no certain answers are possible. Even the holding of hearings in such cases will impose upon New York's judicial system, and in corresponding degree on the Federal system, a substantial burden and needlessly consume the time of assigned counsel, law enforcement officers, prosecutors, those judges who accepted the pleas and those judges who must now take time to hold the hearings.

For many years these cases had been concluded and forgotten. How can it be supposed more than 13 years after Ross' plea of guilty to second degree murder that there can be any reliable reconstruction of what the prosecution and defense knew about the nature and weight of the evidence available in 1955, or about the facts relevant to the "confession" and the state of mind of Ross at the time he pleaded guilty? While Ross has had time in prison to store up memories and imagine what happened in May 1954, when the murder occurred, and in 1955, when he pleaded guilty, the state's files of the case have been stored away and must be found if they can be. The prosecutor will have little, if any, memory of the case apart from what the file may disclose, and Ross' counsel, if he be available, may no longer have any files or any memory about the matter whatsoever.

Slim as are the chances of any reliable reconstruction of the situation as it bears on the 1955 plea, even slimmer are the chances of again prosecuting the case should the judgment of conviction based upon the plea of guilty be set aside. The witnesses available in 1955 may no longer be available; and even if they are available they could hardly be expected to have any trustworthy memory of events in May 1954. Almost certainly, since there was no trial of the action,[1] none of the witnesses gave testimony in such form that it could be used now in the event that they cannot be located.

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[1] In this respect the state is usually at a serious disadvantage where pleas of guilty are nullified and the case must be tried years later. Where there has been a trial and a retrial is required, the state may use the evidence of a witness who has become unavailable. New York Code of Criminal Procedure § 8(3)(d). Where a defendant has pleaded guilty, however, it would be a very rare case where the witness would have testified under oath subject to cross-examination under such circumstances that the evidence could be used if the witness were later unavailable.

Of course, the petitioners will testify concerning their claims in the light of their present state of mind with their imaginations prodded and guided by recent court decisions, including the majority opinion here, which point out the facts which will support a petition.

Settling cases on pleas of guilty is the means whereby the state and the defendants concerned dispose of about 80% of all charges of serious crime and about 95% of all convictions of such crimes. Of course in all such cases defendants are represented by counsel and, almost without exception, this had been the practice in the State of New York for many years prior to *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). It is a system which is advantageous to all the parties concerned; it saves an enormous amount of time for law enforcement officers and prosecutors; almost always it virtually guarantees the defendant a lesser penalty, usually on lesser and fewer charges,[2] it frequently makes possible the prosecution or disposition of charges against other persons; it enables the judges and courts to handle many times the volume of cases which could be processed were trial required in every case.

If a defendant's decision to plead guilty can be attacked and placed in jeopardy many years later, the state will have been deprived of a substantial part of the benefit which it properly and fairly thought it should enjoy—namely, achieving a sure and certain result and saving considerable time and expense. Once the court has accepted the plea and imposed sentence there is nothing which the state can do to reopen it. The charges which have been dismissed and disposed of are finally settled

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[2] The rationale for this has been articulated in the American Bar Association Standards for Pleas of Guilty, formulated by an Advisory Committee of which Walter V. Schaefer, Justice of the Supreme Court of Illinois, was Chairman and adopted by the ABA House of Delegates in February 1969.

forever. Absent any fraud or overreaching existing at the time of the plea, the same rule should apply with respect to the defendant's right to reopen the case. The people cannot benefit from any subsequent change in the law and the defendant should have no right to reopen the proceedings years later because some different procedure has been created by judicial decision.

The interest in finality is particularly important in this area because of the great percentage of convictions based upon pleas of guilty. As shown by the chart below, about 95% of all New York State indictments resulting in conviction are disposed of by pleas of guilty; in other words, for every conviction obtained after trial, 19 convictions are obtained by guilty pleas.

DISPOSITION OF INDICTMENTS IN NEW YORK STATE
(excluding youthful offender cases)[3]

Year ending June 30,	*Total dispositions*[4]	*Disposition by dismissal, discharge on own recognizance, and acquittal*	*Total convictions (after trial and by guilty plea)*	*Convictions by guilty plea*	*% of total dispositions based on guilty plea*	*% of total convictions based on guilty plea*
1963	18,711	3,288	15,423	14,655	95.0%	78.3%
1964	17,619	2,445	15,174	14,413	94.9%	81.8%
1965	16,421	2,188	14,233	13,501	94.8%	82.2%
1966	17,447	2,204	15,243	14,482	95.0%	83.0%
1967	18,029	2,701	15,328	14,461	94.3%	80.2%
Total 1963-1967	88,227	12,826	75,401	71,512	94.8%	81.0%

[3] From the annual reports of the Administrative Board of the Judicial Conference of the State of New York, for the years 1964

(*footnote continued on following page*)

Were there any reason to suppose that injustice has resulted from the taking of pleas of guilty in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases. For many years New York State has provided counsel in all cases where serious crime is charged and the defendant is unable to retain counsel. Absent some credible and detailed proof to the contrary, we must assume that defendants have been properly advised by their counsel, that their interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing that the defendants were guilty in facts and guilty in law.[5]

For these reasons I find no justification in questioning these pleas of guilty in the light of the claims the petition-

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(*footnote continued from previous page*)

(pp. 236-239), 1965 (pp. 193-195), 1966 (pp. 269-271), 1967 (pp. 243-246), 1968 (pp. 333-335).

[4] The figures were arrived at by adding the figures from the Criminal Terms of the Supreme Court of New York City and the Supreme and County Courts outside New York City. The figures include all indictments disposed of:

(1) by plea of guilty to felony before, during or after trial,
(2) by plea of guilty to misdemeanor reduced from felony before, during, or after trial,
(3) by dismissal of the indictment,
(4) by discharge on own recognizance,
(5) by direction of acquittal.
(6) by acquittal after trial,
(7) by conviction after trial.

[5] Of course the gross incompetence of counsel *or* other circumstances indicating substantial failure of representation would present a different question under the Sixth Amendment. No claim of that sort is even suggested in these cases.

ers have made here. Nor do I find anything in any decision of the Supreme Court which requires a Federal court to hold a hearing on such claims. In *Machibroda* v. *United States,* 368 U. S. 487 (1962), the claim was that the court had not made proper inquiry regarding the voluntary nature of the plea as required by Rule 11, Federal Rules of Criminal Procedure, and also that the plea was entered because of promises and threats of the prosecutor. The court there held that despite affidavit denials by the prosecutor, the issues of fact required a hearing. No such compelling allegations are made by Ross or Dash.

Nor does *Jackson* v. *Denno,* 378 U. S. 386 (1964), require the district court to consider the confession claims. *Jackson* held that a defendant who had gone to trial, before a jury which was left to determine whether the confession admitted in evidence was voluntary, had been denied due process of law, since it was impossible to determine how the jury treated the confession. Here, however, the unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determine since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-*Jackson* procedure has had a far more remote effect on the reliability of the process for determining guilt, cf. *Johnson* v. *New Jersey,* 384 U. S. 719, 729 (1966), in plea of guilty situations than it has had in cases which actually went to trial.

Nor is it accurate to say that going to trial and contesting the voluntariness of their confessions was a useless procedure for defendants who claimed that their confessions had been coerced. Since 1955 this court has carefully examined records in New York State criminal trials where

such claims were made, and in some cases we have found that the confessions were coerced, despite jury findings to the contrary which had been accepted by the New York courts. See, e.g., *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (1955), cert. den. 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7 (1958), cert. den., 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee,* 270 F. 2d 513 (1959), cert. den., 361 U. S. 950 (1960).

For these reasons, and because of the far greater effect it would have upon the administration of justice if it were applied to plea of guilty case, I think it is clear that *Jackson* v. *Denno* should be applied retroactively only to cases which went to trial. Cf. *Stovall* v. *Denno,* 388 U. S. 293 (1967).

There is no authority to the contrary. In the only case where this court has required a hearing involving a plea of guilty in a state court, *U. S. ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308 (1963), the claim was that the trial judge had coerced the plea; there was no claim of a coerced confession.[6]

While I would affirm the denial of the prisoners' petitions for the reasons stated above, I also believe that even on principles stated in Judge Smith's opinion, it is clear that there is an insufficient basis to require a hearing. Therefore I proceed to discuss the facts of the two cases.

Petition for Wilbert Ross

On February 4, 1955, when Ross pleaded guilty to murder in the second degree, he knew that one Robert

[6] Following this 1963 opinion there was an extensive hearing in the district court at which the state judge testified. The district court judge held that there had been no coercion by the state court judge and we affirmed he district court's denial of the petition for habeas corpus. 348 F. 2d 373.

Jenkins (whom he does not deny knowing) had told the police that Ross had forced him to commit the murder by threatening Jenkins' life and the life of Jenkins' wife. Ross knew this because, by means of an inter-office device, he heard Jenkins tell this to the police. At this time Ross was in jail on a charge of attempted grand larceny. Ross claims that following threats of the detectives, and after his request to consult his lawyer had been refused, he gave a statement which he signed after it had been reduced to writing. He was later questioned by an Assistant District Attorney and he signed a statement which consisted of questions and answers which had been stenographically recorded. He was not advised about an attorney and he did not ask to consult an attorney.

Ross advised the police where they could find the murder weapon and they did find it. Ross does not claim to be innocent of the murder; it is abundantly clear that he is not.

Had Ross stood trial and had he testified he would have had to admit to a criminal record—by his own petition he had by then been convicted of attempted grand larceny (whether after trial or on plea he does not state) for which he had meanwhile been sentenced to a term of two to three years in state prison.

Ross was represented by Harvey Strelzin, Esq., whose competence he does not question, and Strelzin, who knew of Jenkins and the gun, advised a plea of guilty to murder in the second degree. Ross does not offer Strelzin's affidavit in support of his position, nor does he account for his failure to submit any affidavit or statement from Strelzin.

The majority holds that a petitioner must show that the plea was "substantially motivated by the coerced confession" before he is entitled to relief. As illustrated by *Rosen,* which we also decide today, a petitioner is also

required to make a substantial showing that the plea was in fact the result of the coerced confession and not of some other factor before he is entitled to a hearing. Whether the petitioner had made a sufficient showing in any particular case can only be determined by looking at the specific allegations. Where, as here, it appears that there was substantial other evidence against the petitioner, that his counsel recommended that he not pursue the confession claim, that he pleaded to a reduced charge, and that he did not raise the claim for ten years, the petitioner should be required to make more of a showing than the bare boned allegations he has made here before any court should be required to grant a hearing. In my view, petitioner's unsupported allegations suggest a conclusion that his counsel told him not to bother trying to "get back" his confession and going to trial, since he would, even without the confesison (or the gun, for that matter), stand a good chance of being convicted of first degree murder and being sentenced to death. Ross accepted this as good advice and accepted the plea as a good bargain. Far from showing that the plea was substantially motivated by the confession, the allegation shows that it was motivated both by the knowledge of guilt and the fear of being convicted for the crime he actualy committed. In these circumstances, the plea should stand and no hearing to question it should be required.

Petition for Foster Dash

The petition of Foster Dash seeks a hearing on two different grounds: (1) that the plea was involuntary because there was not available to him at the time of his plea in 1959 a constitutional means of testing the voluntariness of his confession; and (2) that the trial judge coerced him into pleading guilty by threatening him that

he would get the maximum sentence if he stood trial and was convicted. As to the first ground, I would deny relief for the reasons I have set forth above.

But, even applying the standards set forth in Judge Smith's opinion, I do not believe a hearing should be granted as Dash gives no reason why he has not supported his petition with an affidavit or statement of his counsel. In fact there is nothing in the record to show who counsel was. The petition is wholly insufficient in failing to supply many material details of which the petitioner must have knowledge.

From Dash's sketchy petition, the answering affidavit of an Assistant Attorney General which is not controverted by Dash as to any stated facts, and from the decisions of the New York courts concerning Dash and his three co-defendants the following emerges:

On February 9, 1959, four persons, one of whom was armed, held up and robbed one Shedletsky in Bronx County. On February 24, 1959, the Grand Jury indicted Joseph E. Fields, "John Doe," "Richard Roe" and "Peter Doe" for the crime. Fields was the only one who had been apprehended soon after the crime and it was he who shortly thereafter named as his three confederates the petitioner, Foster Dash, Albert Devine and Rudolph Waterman.[1]

Dash was arrested on Febuary 25 or 26. His petition alleges the police took him to a station house in New York County where he was beaten but said nothing and thereafter to a station house in the Bronx. He requested to contact his family, or that he be permitted to have counsel, but he alleges these were denied him. He was further questioned and held incommunicado for 7½ hours

[1] Apparently Waterman was not questioned until June, 1959, when he was in prison on another charge. The record does not show when Devine was arrested.

and then taken to the district attorney's office. He alleges threats made to him and the denial of his further requests. He says that he "then involuntarily signed a prefabricated confession to a crime that I did not commit."

Dash first mentions his "defense counsel" as being present on March 16, 1959 when he appeared for pleading and the district attorney "was only offering a plea to robbery in the first degree." He claims counsel advised him to plead guilty and throw himself on the mercy of the court because of the confession.

When the case came up again for pleading on April 1, 1959, Dash alleges the trial judge stated that if he went to trial and lost, the court would impose the maximum penalty and the judge said the crime with which he was charged was "next to murder."

Dash alleges that when the case was called again on April 6, he entered a plea of robbery in the second degree "due to the undue pressure which was placed upon this relator, as well as the alleged co-defendant." Later in his petition Dash states that "the threats made by the court was not a matter of open record." Fields also pleaded guilty that day. Later, on August 3, 1959, Dash was sentenced to a term of 8 to 12 years as a multiple offender. From Dash's petition it seems that prior to the plea he was already a second felony offender and if he pleaded guilty he faced a possible maximum sentence of 60 years. Fields was sentenced to 10 to 12 years.

Waterman and Devine stood trial and following their conviction for robbery first degree, grand larceny second degree and assault second degree, they received sentences of 15 to 20 years. The Appellate Division in *Peop.* v. *Waterman*, 12 A. D. 2d 84, reversed the convictions and the Court of Appeals affirmed on the ground that it was constitutional error to admit into evidence the post-indictment statement of Waterman taken in the absence of counsel, 9 N. Y. 2d 561 (1961). Waterman and Devine

later pleaded guilty to assault second degree and were sentenced to 2½ to 3 years.

Dash then brought *coram nobis* proceedings, seeking treatment similar to Waterman and Devine on the ground that his confession had induced his plea of guilty, and he also claimed his plea was coerced by the judge's threat. His petition was denied by all courts although in the Court of Appeals two judges voted to remand for a hearing as to whether the guilty plea was coerced. In its memorandum decision, 16 N. Y. 2d 493 (1965), the Court of Appeals, because *Jackson* v. *Denno, supra,* had but recently been decided, expressly approved its earlier holding in *People* v. *Nicholson,* 11 N. Y. 2d 1067 (1962), that it would not listen to post-conviction attacks on confessions where defendants had pleaded guilty. The court wrote:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by *coram nobis* or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert his alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

Thereafter Dash knocked on the federal court doors of the Southern District.

In my view, Dash, advised by counsel, made a deliberate and voluntary choice that his interests were best served by

his plea of guilty. He must have known that Fields had made a statement to the police which implicated him; he did not know what Waterman and Devine might do.

But the petitioner says nothing about what counsel advised him, what he and counsel knew and what evidence was available to the state. We are not even told the name of counsel and whether counsel was retained or assigned. We do not know whether the victim of the robbery, Shedletsky, could identify Dash; obviously he had identified Fields who was caught soon after the crime.

As to the second ground for a hearing, the alleged threats of the judge, the New York Court of Appeals has passed upon this and has held in effect that not enough is alleged to require a hearing. I agree. The allegation seems to amount to little more than that the judge pointed out to the defendant, as indeed he should have, what he faced in the event of conviction, whether by trial or plea. Obviously the record does not bear the petitioner out as he alleges that "the threats made by the court was not a matter of open record." If we had before us an affidavt of counsel or any other reliable witness to support Dash's claim of judicial coercion there might be sufficient reason to order a hearing as we did in *U. S. ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308 (1963) where the court thought the minutes were ambiguous. But here there is insufficient substantiation and the district court properly denied a hearing.

For these reasons I would affirm the judgments of the district courts which denied the petitions of Ross and Dash for writs of habeas corpus.

The enforcement of their criminal laws by the states is an area where federal courts should act with some care and with due appreciation of the consequences. When the Supreme Court decided *Fay* v. *Noia,* 372 U. S. 391 (1963), where it held that federal habeas corpus is still available

to a state prisoner even though he has failed to appeal his conviction, Mr. Justice Clark in his dissent pointed out that the floodgates were being opened. The following year state prisoners filed 3,531 petitions in federal courts, an 80% increase over the 1,903 petitions the year before. The tide rises year by year:

Fiscal Year	*State Prisoner Habeas Corpus petitions filed in the Districts Courts*[a]
1963	1,903
1964	3,531
1965	4,664
1966	5,162
1967	5,948
1968	6,331

As a majority of my colleagues have now clearly charted for all state prisoners who are imprisoned after pleas of guilty what they must allege in order to get a hearing, it will follow as surely as night follows day that the federal courts will be inundated with petitions which will total many times the 6,331 commenced in 1968.

Everywhere in the United States local courts and prosecutors are today having to cope with a steadily mounting increase in criminal cases each one of which requires two or three times more court time than was the case a few

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[a] The District of Columbia, the Canal Zone, Guam and the Virgin Islands are excluded. See the Annual Report of the Director of the Administrative Office of the United States Courts (p. II-44, preliminary ed. 1968).

Of the total of 27,539 such petitions filed during the period from 1963-1968, 3,581, or 13%, were filed in the district courts of the Second Circuit. See the annual reports of the Director of the Administrative Office of the United States Courts for the years 1963 (p. 201), 1964 (p. 221), 1965 (p. 183), 1966 (p. 175), 1967 (p. 205), 1968 (table C-3, preliminary edition).

years ago. Counsel is usually assigned at the beginning of the case, at least as early as the arraignment. Thereafter preliminary hearings are held on search and seizure, the admissibility of confessions, identification and other evidence. Only after such hearings have been decided adversely to the defendant, are cases tried or pleas of guilty entered. Thereafter appeals are taken, and in New York these may be taken even after pleas of guilty. But this will not be the end because the federal courts, if the views of my colleagues in these cases should prevail, must now entertain petitions from state prisoners who pleaded guilty years ago and hold thousands of hearings.

With these decisions we accelerate unmistakably the trend toward federal court supervision and correction of every possible error or supposed error which can be made in the prosecution of a state criminal case. What plea of guilty cannot be alleged to have been "coerced" for some fanciful reason? What is there left which cannot be argued to be a violation of due process, or an unequal protection of the laws? How is the most competent and experienced attorney who is assigned to represent a defendant to protect himself against any charges of incompetence or failure fully to advise a defendant regarding a proper defense to the charges or a settlement by way of guilty plea?

I wish to be counted among those who do not think federal judges were ever meant to review every state criminal proceeding or that there is any basis for supposing that they can reach a more just result than the state court judges. We would be well advised not to arrogate so much ultimate power to ourselves, as has been done by federal decisions the past six years, in the name of safeguarding constitutional rights, and to be chary of exercising such power except in the most compelling circumstances. We have gone far enough already; we should not take the further step which will lead to the review, in one guise or another, of every plea entered in a state court.

I would affirm the district court orders which denied the petitions.

MOORE, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Friendly concur):

I would not differ from Judge Smith's thoughtful and carefully analytical opinions in this and the companion case, *United States ex rel. Dash,* including the comment "when to hold a hearing has apparently been complicated in this Circuit," were it not for the fact that these decisions well illustrate the "complicated" nature of the problem, namely, hearings directed in *Ross* and *Dash* and no hearing in *Rosen.*

My doubts and disagreement stem from the majority's assumption that "This case raises the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain,* 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession."

The belief of four members of the Court in *Townsend* v. *Sain, supra,* as to the ineffectiveness of the so-called "standards" in actual application is well expressed in the dissenting opinion of Mr. Justice Steward at 325-334. Furthermore, I find nothing in *Townsend* v. *Sain* which indicates that "where the petitioner in such a case has not received a 'full and fair evidentiary hearing' in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court."

Townsend was convicted of murder after trial by jury; the habeas corpus proceeding was based upon the illegal admission of a confession obtained while he was under the influence of drugs. The Supreme Court was not dealing

with a plea of guilty, the circumstances under which it was made or, as here, the quality of the evidence in the petition attacking the plea. Therefore, the so-called "standards" of the majority in *Townsend* v. *Sain* relating to the development of the factual circumstances surrounding an illegal confession cannot be expected to be the standards which that Court would have set were it dealing with a situation in which petitioner sought to repudiate a guilty plea.

Referring to the specific cases now under consideration: In *Ross,* the trial court had all the essential facts before it to render an objective decision, yet this court directs a hearing. In *Rosen,* in addition to allegations of the existence and threatened use of a coerced confession, there was proof that Rosen's wallet (comparable to the gun evidence in *Ross*) was found at the scene of the burglary and that he "was represented at trial by [experienced] counsel whose competence he does not attack." Accordingly, this court finds that "the application was insufficient" to justify a hearing. In *Dash,* there was also the existence and threatened use of an allegedly coerced confession and a State-court-rejected claim of a threat by the trial judge to impose a maximum sentence if Dash were found to be guilty. This court holds that "In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing."

If "motivation" is to be the test, of necessity there must be a hearing in all cases so that the prisoners' mental processes may be reviewed and appraised in the light of their present reflections over their now-much-regretted decisions to plead guilty. If our decision to consider *en banc* these three cases has been for the purpose of affording some "standards" for district court judges in their determinations as to when to hold a hearing, our deliberations and the results thereof have been an exercise in futility. The conclusion is obvious that appellate judges have chosen to read the petitions differently in the three cases

and that the strongest factual case for denial of a hearing, *Ross,* leads the group in reversal of the district court's appraisal of the merits of the application.

The answer is not to be found in generalities in the many cases in which hearings had actually been held in the district court. In this group are: *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965), *cert. denied* 382 U. S. 869; *Hall* v. *United States,* 259 F. 2d 430 (8th Cir. 1958), *cert. denied* 359 U. S. 947; *Watts* v. *United States,* 278 F. 2d 247 (D. C. Cir. 1960); *United States ex rel. Staples* v. *Pate,* 332 F. 2d 531 (7th Cir. 1964); *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965); and *United States ex rel. Siebold* v. *Reincke,* 362 F. 2d 592 (2d Cir. 1966).

None of these cases bear upon the issue "when to hold a hearing." This question must, and can, be determined only from the papers before the district judge. This truism, often overlooked or ignored, was succinctly stated in *United States* v. *Ellenbogen* (Anderson, *C. J.;* Lumbard, *Ch. J.* and Waterman, *C. J.* concurring), 365 F. 2d 982 (1966), as follows:

> "The trial court's exercise of discretion can only be tested in the light of the reasons disclosed at the time the motion was heard and not on the basis of more elaborate representations argued on appeal. *Ungar* v. *Sarafite, supra,* at 589, 84 S. Ct. 841."

Accepting the premise that the district judge has before him only the petition and possible supporting affidavits and the statement in *Glenn* that "a voluntary guilty plea entered upon advice of counsel is a waiver . . .," in my opinion inquiry should focus upon "voluntary" and "advice of counsel." In other words, has the petitioner met his burden of showing, in a factual and not a conclusory manner, that pressures, deceptions or possibly mistakes of

material facts of constitutional magnitude were the inducing cause of his guilty plea—the elements crucial to a decision by the district judge as to when to hold a hearing? To decide this question, the district judge must attempt to make an objective evaluation of an essentially subjective decision by the prisoner, to wit, what induced him to plead guilty? Sufficient factual allegations should be presented so that as accurate a reconstruction of the "guilty plea" scene may be made as possible. First, consider the confession. It was definitely made when Ross was "in custody." The custody, however, was not while under suspicion of the murder but rather in Sing Sing Prison where he was serving a sentence for attempted grand larceny. Second, at the time of his plea, Ross was represented by competent counsel. Third, Ross knew that a co-defendant, Jenkins, had confessed and would testify against him. Fourth, Ross knew where the gun, the murder weapon was. Fifth, Ross' attorney knew of Ross' claim and professed desire to repudiate the confession. Against the background of these facts, Ross pleaded guilty. There is no showing that Ross did not understand their effect on a possible conviction of first-degree murder or that he did not have a full opportunity to discuss all the facts with his attorney and weigh their consequences. Ross has produced no facts indicating incompetence of counsel or inadequacy of access to him.

Upon all the facts, I conclude that the district judge properly exercised his discretion in denying the petition without directing a hearing. Ross, in my opinion, has failed to meet his burden of showing that his plea was involuntary. In a way, every plea is "involuntary" because the defendant is forced—even coerced—by the situation then facing him to make a decision and to choose between the two evils which then confront him. If he chooses the lesser of the two evils, he is scarcely making a "voluntary" (in a Websterian sense) decision. Probably the test

should be an "understanding" decision to be determined as objectively as possible—therefore, the importance of the factual allegations. To be sure, Ross' choice obviously was not easy or pleasant. He alone had to make that choice in the light of his own secret knowledge of his guilt or innocence, the not so secret knowledge of the gun and Jenkins' proof, and aided by the practical and objective advice of counsel.

I do not differ with the majority's statement that "The question to be answered in any case involving a collateral attack on a conviction based on a plea of guilty is usually expressed in terms of whether or not the plea was a 'voluntary' act."—but this is not the question now before us. Nor are we faced with the hypothesis suggested by them, that we would be holding that a coerced confession may never be raised as a factor rendering a plea involuntary. I would not so hold and do not find that our own cases reach this result.

Affirmatively, I would hold that an appellate court should not follow the line of least resistance, namely, to grant a hearing in every case and, thus, by their decisions deter district judges from deciding cases without a hearing where no substantial showing has been made by petitioners that their pleas of guilty were involuntary. This leads me to the conclusion that we should adhere to our supposed appellate function and pass upon the district judge's judgment and not consider the case *de novo*. Using this standard, I find that upon the facts before him in this case, he properly denied the petition without a hearing.

I am not unmindful of the decision in *United States ex rel. Richardson* v. *McMann* (also decided this day). That case presents an unusual exception to the principle that a district judge can pass only upon the papers before him. There we took into consideration the allegations placed before us in an affidavit presented for the first time in the

appellate brief which raised, in effect, the question of inadequate representation of counsel. Whether these charges are frivolous and possibly perjurious or are based upon fact could not have been determined on the papers before us. Under these special and exceptional circumstances, we felt that the interests of justice required a hearing at which all parties, vitally interested in establishing the true situation could be heard.

The *Richardson* case is not in my opinion in any way controlling on the problem here, and I would affirm the district judge's decision.

FRIENDLY, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Moore concur):

No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus "voluntary" in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights.

The two decisions relied on in the majority opinion are *Machibroda* v. *United States,* 368 U. S. 487 (1962), and *Harrison* v. *United States,* 392 U. S. 219, 223 (1968). *Machibroda* was the archetype of a claim of an involuntary plea in the time-honored sense; the defendant alleged this had been made on the faith of a promise by an Assistant United States Attorney that was not performed. While the Court's statement, quoting *Kercheval* v. *United States,* 274 U. S. 220, 223, that guilty pleas should not be accepted "unless made voluntarily after proper advice and with full

understanding of the consequences" is indeed clear, as a concurring opinion here states, what is equally clear is that the Court was not speaking at all to the issue whether a plea so made can nevertheless be set aside, long after the defendant has gotten the benefit of his bargain and when the state has lost its ability to prosecute, because of previous allegedly impermissible conduct by the state. The quotation followed the hardly novel affirmation that "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." The sole issue in the case was whether Machibroda had alleged enough to have a hearing. The Justices who decided he had could scarcely have believed they were settling the altogether different and highly important issue we have before us here. The decision by a sharply divided Court in *Harrison* dealt with still another problem, of rather small practical dimensions, the use of testimony at a previous trial that was claimed to have been induced by a previous illegally obtained confession.

The effort of the concurring opinion to fill the void with an extract from *Herman* v. *Claudy,* 350 U. S. 116, 118 (1956), is a dismal failure. It is true that Mr. Justice Black there stated, to give the quotation in full, "Our prior decisions have established that: (1) a conviction following trial or on a plea of guilty based on a confession extorted by violence or mental coercion is invalid under the Federal Due Process Clause." However, none of the six decisions cited in support of that statement related to guilty pleas. The *Herman* case did concern such a plea but the opinion must be read in the context of petitioner's allegations, 350 U. S. at 119, that:

> "The assistant prosecuting attorney demanded that petitioner sign a plea of guilty to all the charges. When petitioner asked what he was signing, the assistant prosecuting attorney said 'Sign your name and forget

it.' Petitioner was not informed of the seriousness of the charges by the prosecutor or the judge; he did not know that his plea of guilty could result in a maximum sentence of some 315 years; he did not know nor was he informed that he could have counsel. Petitioner pleaded guilty to all of the charges against him. He says now he was innocent of all but one."

No cumulation of resounding adjectives can conceal the chasm separating *Herman* v. *Claudy* from the case before us. If any such facts had been presented here, there would have been no *in banc* and no dissents. To regard a phrase in the *Herman* opinion as compelling decision without regard to the totally different facts that gave rise to it is to ignore rather than to follow the genius of the common law system.[1]

Our own previous opinions point away from the determination now made rather than toward it. While the court sitting *in banc* is free to engage in a new departure, I perceive no sufficient reason for embarking on an uncharted course that will impose a tremendous burden on state and federal judges, prosecutors and lawyers furnishing assistance to the indigent and, to the small extent it has any practical effect, will further impair the ability of society to protect itself "against those who have made it impossible to live today in safety." *Harrison* v. *United States, supra,* 392 U. S. at 235 (dissenting opinion of White, *J.*, see also dissenting opinions of Black, *J.* and Harlan, *J.*).

The court's opinion supplies no intelligible guidelines to help lower courts in handling the Herculean task it assigns

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[1] The same comment applies to the reference to a characterization of *Herman in United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2 Cir. 1963), where this court approved denial of habeas corpus to a petitioner who alleged that his guilty plea was induced by an illegal search.

them. A hearing must be had whenever a prisoner makes "particularized allegations as to how that confession rendered his plea involuntary." This test will speedily become well known in the prisons and is exceedingly easy to meet; the error made by the relator in *United States ex rel. Rosen* v. *Follette*, decided herewith, will not be repeated. The court gives almost no aid concerning the standard for ruling on petitions after a hearing has been held. Is it enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made "but for" the confession, the trial courts are being given a job impossible of successful performance. Despite superficial similarity, this issue is actually quite different from determining whether a plea of guilty was "voluntary" in the traditional sense. To decide that issue the court need only determine whether unfair pressures were applied; if they were, *non constat* that the defendant would have pleaded guilty without them. For the same reason the question is also less susceptible of satisfactory answer than deciding whether a confession was "voluntary"; yet lack of confidence in the ability of judges to handle that issue underlay the prescription of specific rules on police interrogation in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Even in what would seem the strongest case for the prisoner, namely, where a confession illegally obtained when other evidence was then lacking has been speedily followed by a guilty plea, how can anyone ever know whether the accused would not have made the same decision anyway, because of his knowledge of the availability of additional evidence and the consequent attractiveness of a lower sentence? The only cases concerning which there can be reasonable cer-

tainty are those at the opposite end of the spectrum, where there was so much untainted evidence that the confession could not have been a signicantly motivating factor. If the "but-for" test is the right one, the instances where a court will be required to set aside a guilty plea will thus be a small fraction of the fraction in which a confession was illegally obtained; in an even smaller fraction of these would the defendant have escaped conviction; and the fraction in which he was innocent will, of course, be infinitesimal. If ever a situation called for heeding Mr. Justice Jackson's admonition against seeking needles in haystacks, *Brown* v. *Allen*, 344 U. S. 443, 536-39 (1953) (concurring opinion), and enabling courts and lawyers to devote their limited time to worthier causes, this is it.

On the other hand, any standard less severe than the "but-for" test would be grossly unfair to the state, and even this is unfair enough. In contrast to the situation where the legality of a confession has been tested before or in the course of a trial, the prosecutor will generally have dismantled whatever material he had. If the constitutional claim succeeds, the state will rarely be able to conduct the trial that is all the defendant deserves on any view, even though sufficient untainted evidence was available when he pleaded guilty years before. Here, if Ross had elected to stand trial for murder fourteen years ago, Jenkins would have been an important witness against him; we are not told whether Jenkins is still available but, even if he is, his evidence concerning events of 1954 will not be very convincing. The way to protect both the accused and society with respect to this problem, is through statutes like §§ 813-c and 813-g of the New York Code of Criminal Procedure which allow the defendant to move in advance of plea to suppress the fruits of an unconstitutional search or an illegally obtained confession and, if the motion is denied, to plead guilty and nevertheless appeal; a record

is thus made and, if the accused prevails, he can be tried before too much time has elapsed since the crime. With these statutes taking care of the future, I would leave the past where these prisoners were content to have it.

I recognize that the court apparently limits itself for the time being, to New York confessions antedating *Jackson* v. *Denno,* 378 U. S. 368 (1964), and postpones the problems with respect to later New York confessions, those in Connecticut and Vermont, and illegal searches and seizures. I realize also that a special argument can be formulated concerning these pre-*Jackson* confessions on the basis that the accused had no constitutionally acceptable way to test their legality. But the pejorative overtones of such a statement considerably outrun the fact. While the procedure prescribed by *Jackson* is a substantial improvement, the previous New York practice was a long way from denying an accused a reasonable opportunity to have the validity of his confession determined. The majority in *Jackson* conceded that New York's belief in the fairness of its procedure was "not without support in the decisions of this Court," 378 U. S. at 395, notably *Stein* v. *New York,* 346 U. S. 156 (1953), and four Justices found nothing constitutionally wrong with it. Furthermore there was always the opportunity to resort to federal habeas corpus in the event of conviction and to have the voluntary nature of the confession tested there. The case where a defendant otherwise willing to stand trial was forced into a guilty plea by the difference between pre-*Jackson* and post-*Jackson* procedures with respect to confessions, is thus a construct of the fertile brains of defense lawyers without counterpart in reality.

The rhetoric in the concurring opinion is badly misplaced. The issue is not whether Ross and others like him should be denied rights accorded them under the due process clause, which all would agree they should not, but whether,

after having made a bargain recommended by competent counsel with full knowledge of the facts and the consequences, they should now be permitted to repudiate it on grounds whose availability was then well known to them, at a time when the state is unable effectively to controvert either their claims of illegality or prove their guilt. Any morality in this position altogether eludes me. It is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection from the court and on the advice of counsel. The thousands of tedious journeys which we here inflict on state and federal judges cannot be justified by any real prospect that a few innocent defendants may be found at the end of the tunnel. Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are.

For these reasons, as well as those given by my brothers Lumbard and Moore, in whose opinions I join, I decline to participate in opening up a large new area where New York criminal convictions have been thought until this time to possess finality.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 371—September Term, 1967.

(Argued April 1, 1968 Decided February 26, 1969.)

Before:

MOORE, WOODBURY* and SMITH,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Stephen W. Brennan, *Judge*, denying appellant's petition for a writ of *habeas corpus*, application for reargument, and application for a certificate of probable cause.

Reversed and remanded for a hearing.

JOHN T. BAKER, New York, N. Y., *for appellant.*

LILLIAN Z. COHEN, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y.; Samuel A. Hirshowitz, First Assistant Attorney General, New York, N. Y., of counsel), *for appellee.*

* Of the First Circuit, sitting by designation.

MOORE, *Circuit Judge:*

This is an appeal from an order denying appellant's* petition for a writ of habeas corpus, for reargument and for a certificate of probable cause without an evidentiary hearing to determine the voluntariness of appellant's plea of guilty of second degree murder in the Supreme Court, New York County (28 U. S. C. § 2253).

On March 24, 1963, two of appellant's relatives were found murdered in their apartment and on the same day appellant was taken into custody. He told police that he had been in his relatives' apartment at the time an altercation between them began and claimed that he had attempted to break it up and, in so doing, got blood on his clothes. He was later booked for homicide and shortly thereafter, signed a confession. On April 20th, appellant was indicted in New York County, New York, for murder in the first degree and two attorneys were assigned to represent him. On that date he pleaded not guilty. On July 22nd, appellant withdrew his plea of not guilty to first degree murder and entered a plea of guilty to murder in the second degree under the first count of the indictment to cover both counts of the two-count indictment. He was convicted on that plea and was sentenced on October, 9, 1963, to a term of 30 years to life.

A subsequent motion to suppress the confession was treated as an application for a writ of error *coram nobis* and was denied without a hearing on July 27, 1964, by the Supreme Court, New York County. The Appellate Division affirmed without opinion. *People* v. *Ricardson,* 23 A. D. 2d 969 (1st Dep't 1965). Leave to appeal to the New York Court of Appeals was denied on June 8, 1965. State court remedies have been exhausted.

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* Appellant refers to relator, Willie Richardson.

Appellant presented a petition to the district court in which he alleged in substance that his plea of guilty to a reduced charge in the State court was invalid because it was induced by the existence or threatened use of an allegedly coerced confession.

Accompanying his brief to this Court, appellant has annexed an affidavit entitled "SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS" and claims that because he was without counsel when he filed his petition he "failed to include several facts" relevant to his petition and to his appeal. This affidavit was not before the district court which had no opportunity to consider it or the "facts" therein set forth. Despite the fact that this supplemental affidavit is not a part of the district court record, it is received so that the matters therein alleged may be thoroughly investigated and, if possible, the truth ascertained.

Appellant states in this affidavit that after indictment for first degree murder (1) Alfred Rosner, Esq., was assigned to represent him; (2) that Mr. Rosner came to see him the last week of June or the first week of July 1963; (3) that his entire visit "lasted approximately 10 minutes"; (4) that although Mr. Rosner asked what happened, he "did not take any notes"; (5) that "He [Mr. Rosner] told me [appellant] that he would get paid the same amount of money for representing me [appellant] regardless of the outcome"; (6) that "He [Mr. Rosner] did not mention what he intended to do to help me [appellant] or prepare my case"; (7) that the next time (July 22, 1963) he saw Mr. Rosner after the first visit in jail was when appellant was taken to the courtroom; (8) that three or four minutes before the proceeding began, Mr. Rosner told appellant that he should change his not guilty plea to a plea of guilty of second degree murder; (9) that appellant protested that he was not guilty, that the confession was taken

because of fear and physical beatings but that Mr. Rosner said that it was not the proper time to bring up the confession and that a guilty plea would save his life and "then I [appellant] could later explain by a writ of habeas corpus how my confession had been beaten out of me"; (10) that Mr. Rosner said that "the District Attorney, Mr. Hogan, was an extremely tough man and that he would be in court later"; (11) that Mr. Rosner told appellant that "the confession would in all probability get me [appellant] the electric chair and that he could attack the confession later without risking his life; that these were the motivating reasons for the change of plea, and that "I [appellant] did not plead guilty because I had committed the crime."

In contrast to this supplemental affidavit signed by Willie Richardson and notarized under a "County of New York" heading on January 15, 1968, by William E. Donahue, the record of the change of plea proceedings on July 22, 1963, before the Hon. George Postel of the New York Supreme Court, Special and Trial Term, Part 34 (appellant's appendix) shows that appellant was represented by two attorneys, Alfred I. Rosner, Esq., and William P. McCooe, Esq.; that the following colloquy took place between Court and the defendant [appellant here]:

> The Court: Now, did you discuss this case fully with Mr. McCooe and Mr. Rosner?
>
> The Defendant: Yes, sir, I did.
>
> The Court: Did you understand them when you spoke to them about your case?
>
> The Defendant: Yes, sir.
>
> The Court: Were you threatened in any manner, shape, or form, by anyone in order to induce you to take this plea?
>
> The Defendant: No, sir.

The Court: Are you taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises been made to you by anyone, that is, your counsel, the District Attorney, the court officers, jail keepers, or anybody, concerning the sentence which this Court, meaning I, will impose in this case?

The Defendant: No, sir.

The Court: You are taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises—without any promises of whatever kind or nature so far as sentence is concerned; is that right?

The Defendant: Yes, sir.

In *Townsend* v. *Sain,* 372 U. S. 293, 312-13 (1963), the Supreme Court stated the principle for determining when an evidentiary hearing must be held in a *habeas corpus* case:

> ". . . Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

This basic principle holds true unless a petitioner's allegations are "vague, conclusory, or palpably incredible," *Machibroda* v. *United States,* 368 U. S. 487, 495 (1962), or are "patently frivolous or false," *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 119 (1956).

Shortly after the decision in *Townsend* v. *Sain,* this court had occasion to consider the requirement of holding an evidentiary hearing in a *habeas corpus* case presenting, as here, an issue of the voluntariness of a guilty plea. In *United States ex rel. McGrath* v. *LaValle,* 319 F. 2d 308, 311-12 (2d Cir. 1963), this court stated:

> "When the petition in support of an application for *habeas corpus* reveals upon its face that it is defective as a matter of law, the habeas court may dismiss the application without a hearing. . . . Moreover, a hearing is not required when the habeas court has before it a full and uncontested record of state proceedings which furnishes all of the data necessary for a satisfactory determination of factual issues. . . . When, however, petitioner alleges that a guilty plea entered by him was the product of deceit, promise, or threat, and facts are specifically set forth which support that allegation and which create issues incapable of resolution by a simple examination of the files and records before the federal District Court, that court must grant the petitioner a hearing. Certainly, petitioner cannot be denied a hearing merely because the facts asserted by him are contradicted by the answer of the State's prosecuting officers, for it is this denial which creates the factual issue to be resolved." [Citations omitted.]

The court below considered only the transcripts of the minutes of the proceedings when the plea was entered and sentence imposed along with appellant's petition, and concluded that appellant's plea was voluntarily entered and, therefore, no hearing would be necessary.

A conviction which is based upon an involuntary plea of guilty is inconsistent with due process of law and is subject to collateral attack by federal *habeas corpus. McGrath, supra,* 319 F. 2d at 311; *United States ex rel. Siebold* v.

Reincke, 362 F. 2d 592, 593 (2d Cir. 1966). And the Supreme Court has stated that "a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 118 (1965).

In *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963), this court stated that "[a] plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." This statement, however, was subsequently rejected in *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965), *cert. denied,* 383 U. S. 915 (1966). The petitioner in *Glenn* argued that his plea of guilty had been coerced by the existence of an alleged involuntary confession. The district court, however, denied the writ of habeas corpus without an evidentiary hearing after finding that the petitioner had failed to exhaust his state remedies. This court denied the petitioner's request for leave to proceed *in forma pauperis* and for assignment of counsel on a different ground, saying:

> "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him. *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965). Any language to the contrary in *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963) is herewith disavowed." 349 F. 2d at 1019.

The issue of voluntariness had not been briefed, but the decision was apparently based upon a finding that the petitioner had not raised a genuine issue of fact in connection with the voluntariness of the plea.

In *United States ex rel. Martin* v. *Fay,* 352 F. 2d 418 (2d Cir. 165), *cert. denied,* 384 U. S. 957 (1966), this court reaffirmed the holding of *Glenn.* As Judge Waterman (whose concurrence was based on the exhaustion rule) pointed out, the word "voluntary" as used in the majority opinion was ambiguous, the majority opinion seemingly holding that either representation by counsel or a review of the colloquy between the prisoner and the judge was conclusive on the issue of the voluntariness of the guilty plea. Judge Waterman wrote: "I conclude that the majority may have in mind that unless a guilty plea is the product of force directly applied to the speaker at the time he pronounces the word 'Guilty,' no extenuating circumstances of any kind will justify a court in inquiring into events preceding this plea." 352 F. 2d at 419-20.

The weight of authority supports the holding of *Glenn* and *Martin, supra,* to the extent that a *voluntary* guilty plea waives all non-jurisdictional defects. See *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209, 213 (2d Cir. 1967) and cases cited therein. The explanation for this rule was given in *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927), as being that "a plea of guilty differs in purpose and effect from a mere admission on an extra-judicial confession, it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

However, if a voluntary guilty plea is to be equated with a waiver of important constitutional rights, it is only logical that the standards for determining voluntariness must be as high as those for waiver. The presence of counsel and the conversation between judge and prisoner at the time the plea is taken are not necessarily conclusive on the question of whether the plea was voluntary. While these factors are relevant in determining whether the plea was voluntary, there may well be situations in which other

matters which are outside the record must be considered in making that determination.

In this case, the petitioner alleges that his guilty plea was the result of the threatened use of a coerced confession, that he did not want to plead guilty and wanted to assert his claim that the confession was coerced, but that his attorney inaccurately informed him that this was not the proper time to bring up the matter and that the claim should be presented at a later time. The decisions of a number of other circuits indicate that a petitioner would be entitled to an evidentiary hearing where somewhat similar allegations are made. See *Carpenter* v. *Wainwright,* 372 F. 2d 940 (5th Cir. 1967); *Doran* v. *Wilson,* 369 F. 2d 505, 507 (9th Cir. 1966); *Shelton* v. *United States,* 292 F. 2d 346, 347 (7th Cir. 1961), *cert. denied,* 369 U. S. 877 (1962). In *Smith* v. *Wainwright,* 373 F. 2d 506, 507-8 (5th Cir. 1967), a case almost identical in its facts to the present appeal, it was stated: "Where the guilty plea has been made after one fifteen-minute conference during which an entire capital case, including an allegedly coerced confession, had to be considered, a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel.' "

The existence or threatened use of a coerced confession may not itself render the guilty plea involuntary. A defendant who has a basis for claiming that his confession was coerced may nevertheless elect to forego that claim and to plead guilty—whether because of "his own knowledge of his guilt and a desire to take his medicine," *Doran* v. *Wilson,* 367 F. 2d 505, 507 (9th Cir. 1966); because "he also knows that other admissible evidence will establish his guilt overwhelmingly," *White* v. *Pepersack,* 352 F. 2d 470, 472 (4th Cir. 1965); because he prefers to plead guilty to a lesser charge rather than run the risk of conviction on a

more serious charge; or because for some other reason he determines that it is in his best interest to plead guilty. A defendant who knowingly and deliberately follows this course should not be in a better position, with regard to the subsequent assertion of such claims on collateral attack, than the defendant who fails to object at trial.

Of course the exploration of these considerations virtually compels disclosure of what occurred between defendant and his counsel. Petitioner, having alleged what was told him and what was not, has waived his privilege against disclosure and his counsel is free to disclose whatever took place between him and his client.

The case is remanded for a hearing to develop all the facts with directions that the hearing be transferred to the Southern District of New York and be held with all reasonable expedition before one of the Judges of said District. In the event that the facts as ultimately found warrant further proceedings, consideration should be given thereto by the appropriate authorities.

On the hearing directed hereby to be held, special attention should be given to the statement given under oath by appellant that he did not plead guilty because he had committed the crime and to appellant's answers on July 22, 1963 under the Court's specific questioning:

> The Court: Now, did you commit this crime?
>
> The Defendant: Yes, sir.
>
> The Court: Now, did you on or about March 24, 1963, in the County of New York, wilfully and feloniously strike Rosalie Smith with a knife, thereby causing her death?
>
> The Defendant: Yes, sir.

Serious charges five years after the event are made under oath against a member of the Bar appointed by the Court to represent appellant in defense of a first degree

murder indictment, which can be summarized as inadequate representation to say the least. Full opportunity should be given to Mr. Rosner and his co-counsel to present their versions of the facts. Appellant and the Assistant District Attorney were also participants in the events of July 22, 1963; the appellant, the notary and probably others in the events of January 15, 1968.

John T. Baker, Esq., whose able representation of appellant is appreciated by this Court, is assigned to represent appellant, Willie Richardson, on the hearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—September Term, 1968.

(Argued September 10, 1968 Decided March 20, 1969.)

Before:

LUMBARD, *Chief Judge*,
SMITH and ANDERSON, *Circuit Judges*.

Appeal from judgment and order of the United States District Court for the Southern District of New York, Thomas F. Croake, *Judge*, denying without hearing application for writ of habeas corpus.

Reversed and remanded.

GRETCHEN WHITE OBERMAN, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief, *for petitioner-appellant*.

MURRAY SYLVESTER, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee*.

SMITH, *Circuit Judge:*

This is an appeal by McKinley Williams from an order of the United States District Court for the Southern District of New York, Thomas F. Croake, *J.*, denying, without a hearing, his application for a writ of habeas corpus. Reversed and remanded for a hearing to determine the voluntariness of Williams' guilty plea.

On January 23, 1956, Mabel Cummings was held up with a toy pistol, raped, and robbed. Two days later Williams was arrested, and while in police custody he confessed. On March 16, 1956, he appeared in Bronx County Court and entered a plea of guilty on the advice of his lawyer. On April 19, 1956, Williams was convicted of second degree robbery on his plea of guilty and was sentenced to 7½ to 15 years in prison as a second felony offender. No appeal was taken from the judgment of conviction.

In 1964 petitioner applied for a writ of error *coram nobis* to vacate this conviction. In his petition, Williams stated that he was arrested without a warrant and taken to the Simpson Street police station where he was held on an "open" charge, that he was held for 16 hours before being arraigned, that he was handcuffed to a desk while interrogated by police about a two-day old crime, that he was threatened with a pistol and physically abused, that he was not informed of his right to counsel, and that he gave a confession out of fear and exhaustion. He also alleged that he was inadequately represented by assigned counsel; that he did not want to plead guilty; that his attorney (who was later disbarred), knowing of an alibi defense, talked him into pleading guilty and misled him into thinking that he was pleading guilty to a misdemeanor rather than a felony. He allegedly was not told of the consequences of his plea or the natre or meaning of the charge. Faced with the allegedly coerced confession, and the New York procedure, later declared unconstitutional

in *Jackson* v. *Denno*, 378 U. S. 368 (1964), whereby the jury would determine the voluntariness of his confession, Williams entered the guilty plea.

His writ was denied without a hearing in the state courts, and thereupon Williams applied for a writ of habeas corpus in the United States District Court for the Southern District of New York. Judge Croake denied Williams' petition without a hearing on the basis of *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018, 1019 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966), where we said that "a voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." In addition, Judge Croake said that he had some difficulty accepting "the assertion that the right to go to trial was relinquished because [petitioner] believed he would not receive a fair determination on the issue of voluntariness," since Williams entered his plea of guilty almost eight years prior to the Supreme Court decision in *Jackson* v. *Denno, supra.*

In *United States ex rel. Ross* v. *McMann*, Docket No. 32140, slip op. 3853 (2 Cir. February 26, 1969) (*en banc*), and its companion case, *United States ex rel. Dash* v. *Follette*, Docket No. 30420, slip op. 3867 (2 Cir. February 26, 1969) (*en banc*), we held that while a voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, a conviction based on a guilty plea is open to collateral attack if the petitioner can show that the plea was not in fact voluntary. Explaining that it was wrong to read *Glenn* as an absolute bar to collateral attack when there is an issue as to the motivation of the plea, we said that there must be a hearing where the constitutional violations alleged are not irrelevant to the issue of voluntariness. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is denied. *Machibroda* v. *United States*, 368 U. S. 487, 493

(1969). The applicable principle was stated by the Supreme Court in *Townsend* v. *Sain,* 372 U. S. 293, 312-313 (1969):

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair subsidiary hearing in a state court, either in the use of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

In *Ross* and *Dash* we also rejected the argument that Williams who refused to run the pre-*Jackson* gauntlet was said to have deliberately waived the right to test the voluntariness of their confessions. "The petitioner herein was deemed to have waived his coerced confession and was deliberately by-passing state procedure when the witness failed to afford a constitutionally acceptable reason presenting that claim, and he cannot be deemed and has entered a voluntary guilty plea if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." *United States ex rel. Ross* v. *McMann, supra* at slip op. 3866.

For the reasons set forth in *Ross* and *Dash,* we think that the allegations in Williams' petition are sufficient to require a hearing on the voluntariness of his guilty plea. He says that he was threatened with a pistol and that he confessed to a "tale" narrated by a plainclothesman. He says that the confession was the only evidence against him, an allegation which, if true, makes this an even stronger case than *Ross* or *Dash.* He says that he was not even in the state at the time of the alleged crime. None of these allegations are controverted by the record.

Unlike *United States ex rel. Rosen* v. *Follette,* Docket No. 32264, slip op. 3907 (2 Cir. February 26, 1969) (*en banc*), therefore, Williams' petition alleges significantly more than the "rather vague claim that the plea was somehow infected by the confession." Slip op. at 3911.

Despite six *coram nobis* applications in New York, Williams has never had a state hearing, and yet plainly the allegations in his petition raise questions which cannot be answered by reference to the transcript alone. If petitioner pleaded guilty on the advice of a lawyer who knew of the existence of a perfectly good alibi defense, then there is certainly some question as to whether Williams was adequately represented by counsel when he entered his guilty plea. "[I]t is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist." *Jones* v. *Cunningham,* 313 F. 2d 347, 353 (4 Cir.), cert. denied 375 U. S. 832 (1965). See also *Quarles* v. *Balkcom,* 254 F. 2d 985 (5 Cir. 1966), where the Fifth Circuit held that the petitioner, who was incarcerated in a county jail on the date of the alleged crime, was entitled to an evidentiary hearing to show that his guilty plea was a "mistake" and that the plea was induced by inadequate representation of counsel.

Similarly, if petitioner was misled by his lawyer into thinking he was pleading guilty to a misdemeanor, there is some question as to whether the guilty plea was made "intelligently." Compare *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2 Cir. 1965). Indeed, the Supreme Court has said that withdrawal of a guilty plea should be allowed if it has been "unfairly obtained or given through ignorance, fear or inadvertence." *Kercheval* v. *United States,* 274 U. S. 220, 224 (1927). Under these circumstances, the petitioner is entitled to an evidentiary hearing to determine whether "the guilty plea was freely

made without infection from the confession and with 'effective assistance of counsel.' " *Smith* v. *Wainwright*, 373 F. 2d 506, 508 (5 Cir. 1967).

This does not mean, of course, that the petitioner will necessarily prevail on the merits, but we think that he has alleged enough to require a hearing. As we said in *Ross* and *Dash*, the conviction would stand if the habeas judge determined either that the confession was voluntary and that petitioner was represented by competent counsel, or if petitioner was unable to show that the plea was substantially motivated by the confession or the alleged incompetence of assigned counsel.

We reserve and remand with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea within 60 days from the date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

LUMBARD, *Chief Judge* (dissenting):

I dissent.

The majority now require the state court, or perhaps the federal court in addition, to inquire into the voluntariness of a plea of guilty entered by Williams in the Bronx County Court in March 1956 to robbery in the second degree in settlement of an indictment which charged 5 felonies including rape and robbery. The trial court must now also inquire into the voluntariness of the confession which Williams claims he made and which he also claims was the inducing cause of his plea of guilty.

For the reasons set forth in my dissenting opinion in *United States ex rel. Ross* v. *McMann*, slip opinion filed February 26, 1969, at pages 3879 to 3894, I would not re-

quire a trial court to inquire into the voluntariness of a plea of guilty entered in a state court prior to the Supreme Court decision in *Jackson* v. *Denno,* 378 U. S. 368 (1964), where the claim is that the plea was induced by an involuntary confession.

In addition it seems to me that the claims of Williams are insubstantial on their face. It seems highly unlikely on this record that the only evidence against Williams could have been his own confession, as he now claims. The charges in the indictment included holding up one Mabel Cummings with a toy pistol, raping her and robbing her. The record discloses no allegations which make it believable that Mabel Cummins could not and would not have testified that Williams was her assailant. Such testimony would usually be sufficient to convict.

Nor is Williams' claim that he had alibi evidence which would have shown that he was out of the state at the time any more believable, as he gives no particulars whatever with respect to such evidence and to his assertion that he advised his attorney of such an alibi and that his attorney failed to do anything about it.

Williams' petition is unbelievable in still another respect—his claim that his lawyer led him into thinking he was pleading to a misdemeanor when he pleaded to robbery in the second degree. This claim is especially incredible in light of the facts that Williams was a second felony offender and that he failed to raise the claim for 8 years.

Of course the state has not yet had reason to refute these claims Williams makes because at the time Judge Croake passed upon them and dismissed the petition without hearing this court had not yet announced its opinion in *United States ex rel. Ross* v. *McMann* and related cases. I point out the insubstantiality of the claims not only to emplasize that, in my opinion, there was no need to make

any answer to Williams' claims, but also because it seems to me that even under the holding of the majority, and what the majority members of this court said in *United States ex rel. Ross* v. *McMann,* it might still be possible for the state to present record evidence of such nature that the petition could be acted upon and dismissed without the calling of any witnesses.

I also refer to these glaring defects in Williams' petition to emphasize the point I made in my dissenting opinion in *Ross* that New York State courts, and subsequently our own federal courts, will be overburdened by the requirement that they spend valuable time in listening to insubstantial claims regarding events so far in the past that memories and records will be so imperfect and incomplete that the court can do little but speculate. Undoubtedly trial judges who must listen to such claims will be able, readily and speedily in the great majority of cases, to determine that the claims are incredible and almost entirely an exercise in imagination prompted by the reading of opinions, such as those in *Ross,* which suggest facts justifying relief.

I would affirm the judgment of the district court which denied the petition without a hearing.

Supreme Court of the United States

No. 153 ---, *October Term, 19* 69

Daniel McMann, Warden, et al.,

Petitioners,

v.

Wilbert Ross, et al.

ORDER ALLOWING CERTIORARI. Filed October 13 ---------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.